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NOTICE OF APPEAL.

(Filed April 5, 1930.)

ATLANTIC COUNTY COURT OF COMMON
PLEAS.

FRANCES LAROSA, by her
next friend, *et als.*,
Plaintiffs,

10

v.

JOHN R. LIVEZEY, BURK
MOTOR COMPANY, a cor-
poration; JOHN P. DIE-
BOLD and EDWARD P.
KOHL, jointly, severally
and in the alternative,
Defendants.

Action at Law.
Notice of Appeal.

20

To Anthony J. Siracusa, Esquire, Attorney for
Plaintiffs:

Dear Sir:

Take notice that the defendant, Burk Motor Com-
pany, a corporation of the State of New Jersey,
hereby appeals to the New Jersey Supreme Court
from the whole of the judgment of the Atlantic
County Court of Common Pleas, entered in the
above-entitled action, on the 7th day of December,
1929.

30

Respectfully,

THOMPSON & HANSTEIN,
Attorneys of Defendant,
Burk Motor Company, a
corporation, etc.

NOTICE ON GROUNDS OF APPEAL.

(Filed April 9, 1930.)

ATLANTIC COUNTY COMMON PLEAS
COURT.

10

FRANCES LAROSA, by her
next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,

Plaintiffs-Respondents,

v.

20 JOHN R. LIVEZEY, BURK
MOTOR COMPANY, a cor-
poration; JOHN P. DIE-
BOLD and EDWARD P.
KOHL,

BURK MOTOR COMPANY, a
corporation, *Appellant,*
Defendants.

Action at Law.
Notice on Grounds
of Appeal.

30 To Anthony J. Siracusa, Esquire, Attorney of
Plaintiffs:

Dear Sir:

Take notice that the defendant, Burk Motor Com-
pany, a corporation of the State of New Jersey, one
of the defendants in the above-entitled cause, ap-
peals to the New Jersey Supreme Court from the

whole of the judgment entered in the above-entitled cause in the Atlantic County Court of Common Pleas, on the following grounds, to wit:

1. Because the Court permitted, over the objection of this defendant, testimony to be given by Doctor Riley as to the physical condition of the plaintiff, Frances LaRosa, a long time after the accident, without connecting her present condition with the accident.

10

2. Because the Court permitted Doctor Allman, on a cross-examination, to answer a question, over this defendant's objection, directed to him by the plaintiff's attorney, in which the premise of said question was inaccurately stated in that the question presupposed testimony by Doctor Madden which was never in fact given by that witness.

3. On the ground that the Court refused to grant the defendant Burk Motor Company's motion for a non-suit at the close of the plaintiffs' case.

4. Because the Court refused to grant the defendant Burk Motor Company's motion for a directed verdict at the close of the plaintiffs' case.

5. Because the Court erred in permitting the jury to pass upon the question of liability of the Burk Motor Company for the injuries alleged in the plaintiffs' complaint.

30

6. Because the proofs of the case as adduced failed to sustain any of the allegations contained in the complaint as against the Burk Motor Company, and therefore the Court erred in permitting the

question of the Burk Motor Company's liability to be passed upon by the jury.

THOMPSON & HANSTEIN,
Attorneys for Defendant,
Burk Motor Company.

10

COMPLAINT.

(Filed Feb. 7, 1928.)

ATLANTIC COUNTY COURT OF COMMON
PLEAS.

FRANCES LAROSA, by her
20 next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,

Plaintiffs,

v.

JOHN R. LIVEZEY, BURK
MOTOR COMPANY, a cor-
poration; JOHN P. DIE-
BOLD and EDWARD P.
30 KOHL, jointly, severally
and in the alternative,

Defendants.

Action at Law.
Complaint.

Plaintiff, Frances LaRosa, who is an infant under the age of twenty-one years, residing in the City of

Pleasantville, in the County of Atlantic and State of New Jersey, with Frank LaRosa, who is admitted by this Court hereto, to prosecute as next friend of Frances LaRosa, by her next friend, says:

FIRST COUNT.

1. She, Frances LaRosa, on or about August 31, 1926, at or about midday, was lawfully walking on a public highway, to wit, the southerly sidewalk of Atlantic Avenue, between Arkansas and Missouri Avenues, in the City of Atlantic City, in the County of Atlantic and State aforesaid. 10

2. At the stated time and place, the defendant, Edward P. Kohl, was negligently and carelessly running, driving and operating an automobile.

3. At the stated time, the defendant, Edward P. Kohl, was wholly without knowledge, skill or experience in the management, operation and control of automobiles. 20

4. As a result of, and because of, the negligence of the defendant, Edward P. Kohl, the said automobile ran upon the sidewalk aforesaid and into the body of the said Frances LaRosa.

5. The defendant, Edward P. Kohl, was negligent in that he undertook to run, operate and drive a dangerous instrumentality, to wit, the said automobile, at the said place, to wit, on Atlantic Avenue, between Arkansas and Missouri Avenues, in the city, county and State aforesaid, and at the said time, to wit, midday in August, 1926, said Atlantic 30

Avenue, at said place and time being heavily traffic-laden and populous.

6. The defendant, Edward P. Kohl, was further negligent in that he drove said automobile at a high, excessive and unreasonable rate of speed; in that he ran the said automobile, without any signal or warning, upon the said sidewalk, in the manner aforesaid; and in that he did not have the said automobile under proper, safe and reasonable control, all of which acts were in violation of the traffic laws of the State of New Jersey and the City of Atlantic City, in said State.

7. As a result of each, any or all of these divers acts of negligence, the said Frances LaRosa was seriously injured, internally and externally, suffered great pain and will continue to suffer great pain, and was hindered from following her occupation for a long period of time and will be periodically prevented from following her occupation in the future.

Plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendant, Edward P. Kohl, the sum of ten thousand dollars, in damages.

30

SECOND COUNT.

1. Paragraph 1 of the first count is hereby made paragraph 1 of this count.

2. At the stated time and place, the defendant, John R. Livezey, was the owner of a certain auto-

mobile, then and there being negligently and carelessly driven by his servant or agent, Edward P. Kohl, in and about the business of the defendant, John R. Livezey.

3. At the stated time, Edward P. Kohl was wholly without knowledge, skill or experience in the management, operation and control of automobiles, all of which the defendant, John R. Livezey, then and there knew. 10

4. As a result of, and because of, the negligence of the defendant, John R. Livezey, the said automobile ran upon the sidewalk aforesaid, and into the body of the said Frances LaRosa.

5. The defendant, John R. Livezey, was negligent in that:

(a) He entrusted a dangerous instrumentality, to wit, the said automobile, to his servant or agent, Edward P. Kohl. 20

(b) He undertook to drive the said automobile, through his servant or agent, Edward P. Kohl, at the said place, to wit, on Atlantic Avenue, between Arkansas and Missouri Avenues, in the city, county and State aforesaid, and at the said time, to wit, midday in August, 1926, said Atlantic Avenue, at said place and time, being heavily traffic-laden and populous. 30

(c) He, through his servant or agent, Edward P. Kohl, drove said automobile at a high, excessive and unreasonable rate of speed, and in that he ran the said automobile, without any signal or warning,

upon the said sidewalk in the manner aforesaid, and in that he did not have the said automobile under proper, safe and reasonable control, all of which acts were in violation of traffic laws of the State of New Jersey, and the City of Atlantic City, in said State.

10 6. As a result of each, any or all of these divers acts of negligence of the defendant, John R. Livezey, the said Frances LaRosa was seriously injured, internally and externally, suffered great pain and will continue to suffer great pain, and was hindered from following her occupation for a long period of time and will be periodically prevented from following her occupation in the future.

20 Plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendant, John R. Livezey, the sum of ten thousand dollars, in damages.

THIRD COUNT.

1. Paragraph 1 of the first count is hereby made paragraph 1 of this count.

30 2. At or about the stated time and place, John R. Livezey, through his servant or agent, Edward P. Kohl, and the defendant, Edward P. Kohl, were then and there negligently and carelessly driving an automobile of which the defendant, John R. Livezey, was the then owner.

3. The defendant, Edward P. Kohl, at the said time, was wholly without knowledge, skill or ex-

perience in the management, operation or control of automobiles, all of which the defendant, John R. Livezey, then and there knew.

4. As a result of, and because of, the negligence of the defendants, John R. Livezey, through his servant or agent, Edward P. Kohl, and Edward P. Kohl, the said automobile ran upon the sidewalk aforesaid and into the body of the said Frances LaRosa. 10

5. The defendants, John R. Livezey and Edward P. Kohl, were negligent in that:

(a) They undertook to operate and drive the said automobile at the said place, to wit, on Atlantic Avenue, between Arkansas and Missouri Avenues, in the city, county and State aforesaid, and at the said time, to wit, midday in August, 1926, the said Atlantic Avenue, at said time and place, being 20 heavily traffic-laden and populous.

(b) They drove the said automobile at a high, excessive and unreasonable rate of speed, and in that they ran the said automobile, without any signal or warning, upon the said sidewalk, in the manner aforesaid, and in that they did not have the said automobile under proper, safe and reasonable control, all of which acts were in violation of the traffic laws of the State of New Jersey and the 30 City of Atlantic City, in said State.

7. As a result of each, any or all of these divers acts of negligence of the defendants, John R. Livezey and Edward P. Kohl, the said Frances LaRosa was seriously injured, internally and externally,

suffered great pain and will continue to suffer great pain, and was hindered from following her occupation for a long period of time, and will be periodically prevented from following her occupation in the future.

Plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendants, John R. Livezey and Edward P. Kohl, the sum of ten thousand dollars in damages.

FOURTH COUNT.

1. Paragraph 1 of the first count is hereby made paragraph 1 of this count.

2. At the stated time and place, the defendant, John P. Diebold, was in possession, management and control of an automobile.

3. At the stated time and place, the defendant, John P. Diebold, was engaged in the business of teaching, explaining and instructing Edward P. Kohl, in the science of driving and operating the said automobile.

4. At the stated time and place, Edward P. Kohl was negligently and carelessly driving and operating the said automobile.

5. At the said time, Edward P. Kohl was wholly without knowledge, skill or experience in the management, operation and control of automobiles, all of which the defendant, John P. Diebold, then and there knew.

6. As a result of, and because of, the negligence of the defendant, John P. Diebold, the said automobile ran upon the sidewalk aforesaid, and into the body of the said Frances LaRosa.

7. The defendant, John P. Diebold, was negligent in that:

(a) He entrusted the management and operation of the said automobile to Edward P. Kohl, at said place, to wit: on Atlantic Avenue, between Arkansas and Missouri Avenues, in the city, county and State aforesaid; and at the said time, to wit, midday in August, 1926, said Atlantic Avenue, at said time and place, being heavily traffic-laden and populous. 10

(b) He failed to properly exercise care, vigilance and control over the operation and management of the said automobile.

8. As a result of each, any or all of these divers acts of negligence, the said Frances LaRosa was seriously injured, internally and externally, suffered great pain and will continue to suffer great pain, and was hindered from following her occupation for a long period of time, and will be periodically prevented from following her occupation in the future. 20

Plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendant, John P. Diebold, the sum of ten thousand dollars in damages. 30

FIFTH COUNT.

1. Paragraph 1 of the first count is hereby made paragraph 1 of this count.

2. At the stated time and place, the defendant, Burk Motor Company, by its servant or agent, John P. Diebold, was in the possession, management and
10 control of a certain automobile in and about the business of it, Burk Motor Company.

3. At the stated time and place, the defendant, Burk Motor Company, through its servant or agent, John P. Diebold, was engaged in the business of teaching, explaining and instructing Edward P. Kohl in the science of driving and operating the said automobile.

20 4. At the stated time, Edward P. Kohl was wholly without knowledge, skill or experience in the management, operation and control of automobiles, all of which the defendant, Burk Motor Company, then and there knew.

5. At the stated time and place, Edward P. Kohl was negligently and carelessly driving and operating the said automobile.

30 6. As a result of, and because of, the negligence of the defendant, Burk Motor Company, through its servant or agent, John P. Diebold, the said automobile ran upon the sidewalk aforesaid and into the body of the said Frances LaRosa.

7. The defendant, Burk Motor Company, was negligent in that:

(a) It entrusted the management and operation of the said automobile to Edward P. Kohl at the said place, to wit: on Atlantic Avenue, between Arkansas and Missouri Avenues, in the city, county and State aforesaid; and at the said time, to wit, midday in August, 1926, said Atlantic Avenue, at the said time and place, being heavily traffic-laden and populous.

(b) It failed to properly exercise care, vigilance and control over the operation and management of the said automobile. 10

8. As a result of each, any or all of these divers acts of negligence, the defendant, Burk Motor Company, through its servant or agent, John P. Diebold, the said Frances LaRosa was seriously injured, internally and externally, suffered great pain and will continue to suffer great pain, and was hindered from following her occupation for a long period of time and will be periodically prevented from following her occupation in the future. 20

Plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendant, Burk Motor Company, the sum of ten thousand dollars, in damages.

SIXTH COUNT.

30

1. Paragraph 1 of the first count is hereby made paragraph 1 of this count.

2. At the stated time and place, the defendant, Burk Motor Company, by its servant or agent, John

P. Diebold, and John P. Diebold, were in possession, management and control of a certain automobile in and about the business of it, Burk Motor Company.

3. At the stated time, the defendant, Burk Motor Company, by its servant or agent, John P. Diebold, and John P. Diebold, were engaged in the business of teaching, explaining and instructing Edward P. Kohl in the science of driving and operating the said automobile.

4. At the stated time, Edward P. Kohl was wholly without knowledge, skill or experience in the management, operation and control of automobiles, all of which the defendants, Burk Motor Company and John P. Diebold, then and there knew.

5. At the stated time and place, Edward P. Kohl was negligently and carelessly driving and operating the said automobile.

6. As a result of, and because of, the negligence of the defendants, Burk Motor Company and John P. Diebold, the said automobile ran upon the sidewalk aforesaid and into the body of the said Frances LaRosa.

7. The defendants, Burk Motor Company and John P. Diebold, were negligent in that:

(a) They entrusted the management and operation of the said automobile to Edward P. Kohl at the said place, to wit: on Atlantic Avenue, between Arkansas and Missouri Avenues, in the city, county and State aforesaid; and at the said time, to wit,

midday in August, 1926, said Atlantic Avenue, at the said time and place, being heavily traffic-laden and populous.

(b) They failed to properly exercise care, vigilance and control over the operation and management of the said automobile.

8. As a result of each, any or all of these divers acts of negligence of the defendants, Burk Motor Company and John P. Diebold, the said Frances LaRosa was seriously injured, internally and externally, suffered great pain and will continue to suffer great pain and was hindered from following her occupation for a long period of time, and will be periodically prevented from following her occupation in the future. 10

Plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendants, Burk Motor Company and John P. Diebold, the sum of ten thousand dollars, in damages. 20

SEVENTH COUNT.

1. Paragraph 1 of the first count is hereby made paragraph 1 of this count.

2. At the stated time and place, the defendant, Burk Motor Company, by or through its servant or agent, Edward P. Kohl, was negligently and carelessly running, driving and operating an automobile, in the course of the Burk Motor Company's business. 30

3. At the stated time, Edward P. Kohl was wholly without knowledge, skill or experience in the management, operation or control of automobiles, all of which the defendant, Burk Motor Company, then and there knew.

4. As a result of, and because of the negligence of the defendant, Burk Motor Company, through its servant or agent, Edward P. Kohl, the said automobile ran upon the sidewalk aforesaid and into the
10 body of the said Frances LaRosa.

5. The defendant, Burk Motor Company, was negligent, in that:

(a) It undertook to run, operate and drive a dangerous instrumentality, to wit, the said automobile, at the said place, to wit, on Atlantic Avenue, between Arkansas and Missouri Avenues, in the city,
20 county and State aforesaid; and at the said time, to wit, at midday in August, 1926, said Atlantic Avenue, at said time and place being heavily traffic-laden and populous.

(b) That it, the Burk Motor Company, through its servant or agent, Edward P. Kohl drove the said automobile at a high, excessive and unreasonable rate of speed, in that it ran the said automobile without any signal or warning upon the said sidewalk in the manner aforesaid, and in that it did
30 not have the said automobile under proper, safe and reasonable control, all of which acts were in violation of the traffic laws of the State of New Jersey and the City of Atlantic City, in said State.

6. As a result of each, any or all of these divers acts of negligence, on the part of the defendant,

Burk Motor Company, through its servant or agent, Edward P. Kohl, the said Frances LaRosa was seriously injured, internally and externally, suffered great pain and will continue to suffer great pain and was hindered from following her occupation for a long period of time, and will be periodically prevented from following her occupation in the future.

Plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendant, Burk Motor Company, the sum of ten thousand dollars, in damages. 10

EIGHTH COUNT.

1. Paragraph 1 of the first count is hereby made paragraph 1 of this count.

2. At the stated time and place, the defendants, Burk Motor Company, by or through its servant or agent, Edward P. Kohl and Edward P. Kohl, were negligently and carelessly running, driving and operating an automobile in and about the business of it, Burk Motor Company. 20

3. At the stated time, the defendant, Edward P. Kohl, was wholly without knowledge, skill or experience in the management, operation and control of automobiles, all of which the defendant, Burk Motor Company, then and there knew. 30

4. As a result of, and because of, the negligence of the defendants, Burk Motor Company, through its servant or agent, Edward P. Kohl, and Edward P. Kohl, the said automobile ran upon the sidewalk

aforesaid and into the body of the said Frances LaRosa.

5. The defendants, Burk Motor Company and Edward P. Kohl, were negligent in that:

10 (a) They undertook to run, operate and drive a dangerous instrumentality, to wit, the said automobile, at the said place, to wit, on Atlantic Avenue, between Arkansas and Missouri Avenues, in the city, county and State aforesaid, and at the said time, to wit, at midday in August, 1926, said Atlantic Avenue being heavily traffic-laden and populous.

20 (b) They, Burk Motor Company, through its servant or agent, Edward P. Kohl, and Edward P. Kohl, drove the said automobile at a high, excessive and unreasonable rate of speed in that they ran the said automobile without any signal or warning upon the said sidewalk in the manner aforesaid, and in that they did not have the said automobile under proper, safe and reasonable control, all of which acts were in violation of the traffic laws of the State of New Jersey and the City of Atlantic City, in said State.

30 6. As a result of each, any or all of these divers acts of negligence on the part of the defendants, Burk Motor Company and Edward P. Kohl, the said Frances LaRosa was seriously injured, internally and externally, suffered great pain and will continue to suffer great pain, and was hindered from following her occupation for a long period of time and will be periodically prevented from following her occupation in the future.

The plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendants, Burk Motor Company and Edward P. Kohl, the sum of ten thousand dollars, in damages.

NINTH COUNT.

1. Paragraph 1 of the first count is hereby made paragraph 1 of this count. 10
2. On or about August 31, 1926, defendant John R. Livezey was the owner of a certain automobile then and there being driven and operated by his servants, agents or employees.
3. At the said time and place herein stated, defendant Burk Motor Company was in possession, management and control of said automobile, by its servants, agents or employees. 20
4. At the time and place herein stated, defendant John P. Diebold, as the servant, agent or employee of defendant, Burk Motor Company, was in the management, operation and control of said automobile in and about the business of the said defendant, Burk Motor Company.
5. At the time and place herein stated, defendant Edward P. Kohl was driving and operating the said 30 automobile.
6. It was the duty of each of the said defendants to use a reasonable degree of care in the operation of said automobile in a reasonable and safe manner and at a reasonable rate of speed, and to have the

same at all times under proper and safe control, so that it should not become and be dangerous to Frances LaRosa and others lawfully using said public highway and sidewalk aforesaid.

7. Yet, nevertheless, the said defendants wholly failed in their duty so to do, but negligently, carelessly and improperly drove, operated and managed said automobile in such a reckless and dangerous manner and in such an excessive and unreasonable rate of speed and failed to have the same under proper, safe and reasonable control, and also failed to make due and proper observation of the conditions of traffic and the traffic laws of the city and State aforesaid, thereby endangering the lives of Frances LaRosa and others, users of said highway, so that the said automobile ran upon the sidewalk aforesaid and hit, struck and knocked Frances LaRosa with great force and violence against the wall of the premises abutting said sidewalk at the point of said collision and injured the said Frances LaRosa without her fault.

8. So, as the result of said accident, due to the negligent conduct of all of the defendants, or some of them, Frances LaRosa was seriously and permanently injured, both externally and internally, suffered great pain and will continue to suffer great pain, was prevented from following her usual occupation, and will be prevented periodically in the future from following her occupation.

9. The cause of the accident was the negligence of defendants as herein set forth.

The plaintiff, Frances LaRosa, by her next friend, Frank LaRosa, demands of the defendants, John

R. Livezey, Burk Motor Company, John P. Diebold and Edward P. Kohl, jointly and severally or in the alternative against any of them, the sum of ten thousand dollars, in damages.

TENTH COUNT.

1. Frank LaRosa, also a plaintiff herein, says that he resides in the City of Pleasantville, County of Atlantic and State of New Jersey, and that he was and still is the father of the plaintiff, Frances LaRosa, and that by reason of the matters, facts and things in the above complaint mentioned, all of which for the sake of brevity are made part of this count, he has sustained damage by being deprived of the services and earnings of his said daughter, and that he has been obliged to lay out and expend large sums of money endeavoring to have his said daughter healed and cured of her injuries, as aforesaid; therefore, he brings his suit against the defendants, jointly, severally or in the alternative, for damages in the sum of five thousand dollars. 10 20

ANTHONY J. SIRACUSA,
Attorney for Plaintiffs.

ANSWER.

(Filed April 18, 1928.)

ATLANTIC COUNTY COURT OF COMMON
PLEAS.

10

FRANCES LAROSA, by her
next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,

Plaintiffs,

v.

JOHN R. LIVEZY, BURK
20 MOTOR COMPANY, a cor-
poration; JOHN P. DIE-
BOLD and EDWARD P.
KOHL, jointly, severally
and in the alternative,

Defendants.

Action at Law.
Answer.

30 Defendant, Burk Motor Company, a corporation,
answering plaintiffs' complaint, says that:

FIRST COUNT.

1. It has no knowledge as to the allegations con-
tained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of the first
count of plaintiffs' complaint, and asks that the
same be proven.

SECOND COUNT.

1. It has no knowledge as to the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of the second count of plaintiffs complaint, and asks that the same be proven.

THIRD COUNT.

1. It has no knowledge as to the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of the third count of plaintiffs' complaint and asks that the same be proven. 10

FOURTH COUNT.

1. It has no knowledge as to the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the fourth count of the plaintiffs' complaint and asks that the same be proven. 20

FIFTH COUNT.

1. He denies the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the fifth count of plaintiffs' complaint.

SIXTH COUNT.

1. He denies the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the sixth count of plaintiffs' complaint. 30

SEVENTH COUNT.

1. He denies the allegations contained in para-

graphs 1, 2, 3, 4, 5 and 6 of the seventh count of plaintiffs' complaint.

EIGHTH COUNT.

1. He denies the allegations contained in paragraph 1, 2, 3, 4, 5 and 6 of the eighth count of plaintiffs' complaint.

10

NINTH COUNT.

1. He denies the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the ninth count of plaintiffs' complaint.

TENTH COUNT.

1. He denies all the allegations contained in the tenth count of plaintiffs' complaint.

20

AFFIRMATIVE DEFENSES.

FIRST AND SEPARATE DEFENSE.

1. Said accident was caused entirely by the negligence of the plaintiff, Frances LaRosa.

SECOND AND SEPARATE DEFENSE.

30

1. The negligence of the plaintiff, Frances LaRosa, contributed to said accident.

THIRD AND SEPARATE DEFENSE.

1. The said accident was caused by the negligence of the defendant, John R. Livezey.

FOURTH AND SEPARATE DEFENSE.

1. The negligence of the defendant, John R. Livezey, contributed to said accident.

FIFTH AND SEPARATE DEFENSE.

1. The said accident was caused by the negligence of the defendant, Edward P. Kohl.

10

SIXTH AND SEPARATE DEFENSE.

1. The negligence of the defendant, Edward P. Kohl, contributed to said accident.

SEVENTH AND SEPARATE DEFENSE.

1. The said accident was caused by the negligence of the defendant, John P. Diebold.

20

EIGHTH AND SEPARATE DEFENSE.

1. This plaintiff, Frances LaRosa, for a consideration, released in writing this defendant from any and all liability for said accident.

THOMPSON & HANSTEIN,
Attorneys for Defendant,
Burk Motor Company.

30

REPLY TO THE ANSWER OF DEFENDANT,
BURK MOTOR CO.

(Filed May 12, 1928.)

ATLANTIC COUNTY COURT OF COMMON
PLEAS.

10

FRANCES LAROSA, by her
next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,

Plaintiffs,

v.

20

JOHN R. LIVEZEY, BURK
MOTOR Co., a corpora-
tion; JOHN P. DIEBOLD
and EDWARD P. KOHL,
jointly, severally and in
the alternative,

Defendants.

Action at Law.
Reply to the Answer
of Defendant, Burk
Motor Co.

30

The plaintiffs, in reply to the answer of the de-
fendant, Burk Motor Company, deny each and
every allegation therein contained, and join issue.

FIRST AVOIDANCE OF EIGHTH AND SEPARATE
DEFENSE.

1. Frances LaRosa was *an infant* at the time of

the execution of the document purporting to be a release.

SECOND AVOIDANCE OF EIGHTH AND SEPARATE
DEFENSE.

1. The document purporting to be a release was conceived in fraud, covin and chicanery, in that the facts leading up to the execution thereof were misrepresented. 10

THIRD AVOIDANCE OF EIGHTH AND SEPARATE
DEFENSE.

1. The document purporting to be a release was extorted by threats and intimidations, that if not given, Frances LaRosa would not be permitted to leave the premises in which said document was executed.

NOTICE OF MOTION. 20

Plaintiffs reserve the right to move to strike out the eighth and separate defense contained in the answer of Burk Motor Company, at or before the time of trial, on the ground that the same is insufficient in law, a minor being incapable of executing a release during infancy.

ANTHONY J. SIRACUSA,
Attorney for Plaintiffs. 30

[ENDORSED]

We hereby consent to the filing of
this reply out of time.

Attorneys for Defendant,
Burk Motor Co.

ORDER.

(Filed May 9, 1928.)

ATLANTIC COUNTY COURT OF COMMON
PLEAS.

10

FRANCES LAROSA, by her
next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,

Plaintiffs,

v.

20 JOHN R. LIVEZEY, BURK
MOTOR COMPANY, a cor-
poration; JOHN P. DIE-
BOLD and EDWARD P.
KOHL, jointly, severally
and in the alternative,

Defendants.

Action at Law.
Order.

30 The matter of striking the third, fourth, fifth,
sixth and seventh separate defenses from the
answer of the defendant, Burk Motor Company, in
the above-entitled cause having come on to be heard,
without formal notice in writing, and by consent of
Anthony J. Siracusa and Thompson & Hanstein,
counsel for the plaintiffs and defendant, aforesaid,
respectively, on May 8th, 1928, before Honorable

William H. Smathers, Judge of the Atlantic County Court of Common Pleas, at the Atlantic County Court House, at Mays Landing, New Jersey, and, Anthony J. Siracusa, attorney for the plaintiffs, and Thompson & Hanstein, attorneys for the defendant, Burk Motor Company, having been heard, and the Court being satisfied that the defenses aforesaid should be stricken from the answer aforesaid,

It is, on this eighth day of May, 1928, ordered 10 that the third, fourth, fifth, sixth and seventh separate defenses be stricken from the answer of the defendant, Burk Motor Company.

WILLIAM H. SMATHERS,
Judge.

RULE FOR JUDGMENT.

(Filed Dec. 10, 1929.)

ATLANTIC COUNTY COMMON PLEAS
COURT.

10

	FRANCES LAROSA, by her next friend, FRANK LAROSA, and FRANK LAROSA, her father, in his own right,	} Action at Law. Rule for Judgment.
	<i>Plaintiffs,</i>	
	v.	
20	JOHN R. LIVEZEY, BURK MOTOR COMPANY, a cor- poration; JOHN P. DIE- BOLD and EDWARD P. KOHL,	}
	<i>Defendants.</i>	

30 This action came on for trial on December 5, 1929, and the trial was concluded on December 6, 1929, before Judge Joseph A. Corio, and a jury, in the presence of counsel of the Burk Motor Company, John R. Livezey, Edward P. Kohl, Frances LaRosa and Frank LaRosa; and the cause having been heard and submitted to the jury, they returned the following verdicts:

For the plaintiff, Frances LaRosa, for the sum of \$5,000.00, and against the Burk Motor Company.

For the plaintiff, Frank LaRosa, for the sum of \$1500.00, and against the Burk Motor Company.

Whereupon, it is adjudged and ordered that judgment be entered for the plaintiff, Frances LaRosa, and against the defendant, Burk Motor Company, for the sum of \$5,000.00; and that judgment be entered for the plaintiff, Frank LaRosa, and against the defendant, Burk Motor Company, for the sum of \$1500.00, together with costs of suit to be taxed.

Dated: December 7, 1929.

JOSEPH A. CORIO,
Judge.

10

20

30

TESTIMONY.

NEW JERSEY COURT OF COMMON PLEAS.
ATLANTIC COUNTY.

10	FRANCES LAROSA, by her next friend, <i>et als.</i> , <i>Plaintiffs,</i>	}	
	v.		
20	JOHN R. LIVEZEY, BURK MOTOR COMPANY, a cor- poration; JOHN P. DIE- BOLD and EDWARD P. KOHL, jointly, severally and in the alternative, <i>Defendant.</i>	}	At Law.

The above-entitled case was tried December 5, 1929, before HONORABLE JOSEPH A. CORIO, Judge, and a jury.

APPEARANCES:

JOHN BARATTA, Esq., for the plaintiff.
 MESSRS. THOMPSON & HANSTEIN, for the defend-
 ant, Burk Motor Company.
 30 MESSRS. STARR, SUMMERILL & LLOYD, for the de-
 fendants, Livezey, *et al.*

(A jury was empaneled, accepted and sworn.)

(Recess to December 6, 1929, at 10 o'clock A. M., at Mays Landing Court House, the county seat of Atlantic County, New Jersey.)

December 6, 1929.

Mr. Baratta: If your Honor please, yesterday I called your Honor's attention to the fact that I had some motions to address to the pleadings. I don't think it will be necessary for your Honor to rule on them, inasmuch as Mr. Bishop has very graciously consented to my motion.

The first one was that the second paragraph of Count 7 in the complaint be made to read so as to include this phrase: "in the course of the Burk Motor Company's business." 10

From that we pass on to the reply —

The Court: Have you those amendments type-written?

Mr. Baratta: No, I haven't, if your Honor please; but they may be ordered and I will supply them. 20

Then we move to the reply in the case, if your Honor please. In Mr. Bishop's answer he sets up a release executed on the part of one of these plaintiffs, to wit, Frances LaRosa. Now, it happens that at the time Frances LaRosa executed the release she was an infant, and I plead infancy and avoidance, and I so set that plea up under first avoidance of the eighth—separate defense. Now, I want to clarify that a little bit so there won't be any question about it. I want the first paragraph under first avoidance of eighth separate defense to say "Frances LaRosa was an infant at the time of the execution of the document purporting to be a release and now disaffirms such document and its purport." 30

The Court: Paragraph 6 of what count?

Mr. Baratta: That is paragraph 1 of the first avoidance of the eighth separate defense, in the reply to the answer of the Burk Motor Company.

Mr. Bishop: That is consented to as an amendment.

10 I understand that in Mr. Baratta's reply, the second avoidance to the eighth separate defense and the third avoidance to the eighth separate defense he alleged threats and intimidation in the procuring of the release, fraud and connivance, and I want to deny those avoidances; and I understand Mr. Baratta will consent to the filing of that reply out of time.

20 Mr. Baratta: Yes. Now, we move to another point. When the suit was brought this Frances LaRosa was a minor. She has since attained majority, on the 26th day of August, 1928. I am going to ask the Court to rule to allow Frances LaRosa to continue the action, insofar as her right of action is concerned, in her own right and in her own name, from that date on.

Mr. Lloyd: I have no objection.

30 Mr. Baratta: In her own right and in her own name altogether.

Mr. Bishop: Leaving the father out completely?

Mr. Baratta: No, the father's cause of action still remains for those elements of damage for which he may be compensated.

Mr. Bishop: That is all right.

(Mr. Baratta opened plaintiffs' case to the jury.)

(Mr. Lloyd opened defendants' (Mr. Kohl and Mr. Livezey) cases to the jury.)

(Mr. Bishop opened the case to the jury for the defendant, Burk Motor Company.)

10

FRANCES LA ROSA, the plaintiff, called as a witness in her own behalf, being sworn, was examined and testified as follows:

Direct examination

By Mr. Baratta:

20

Q. Now, what is your name?

A. Frances La Rosa.

Q. Where do you live?

A. 130 East Bayview, Pleasantville, New Jersey.

Q. Were you living there August 31, 1926?

A. Yes.

Q. And were you in an accident on or about that day?

A. Yes, I was.

Q. Now, where did that accident happen?

30

A. On Atlantic Avenue, on the south side between Arkansas and Missouri.

Q. Yes.

A. Yes, going towards Florida Avenue.

Q. Yes.

A. Getting a trolley.

Q. Trolley for where?

A. To go to Pleasantville. I was walking in front of Burk's Motor Company when all of a sudden a machine came out. It struck me. It pinned me against the wall; backed up and hit me again the second time.

Q. Can you tell us something about the force of the blow, if you know?

A. I couldn't say. I was in a daze. I didn't
10 know anything.

Q. After that what happened?

A. They put me in there.

Q. In where?

A. In Burk's Motor Company.

Q. Was anybody with you in front of this —

A. I had a lady friend with me.

Q. Is she here today?

A. Yes, she is.

Q. After that what did you do?

20 A. Why, after that?

Q. Yes.

A. We were in there.

Q. No, I mean did you go home?

A. I went home, yes. I had to hold on to the lady's arm until I got up to the trolley.

Q. Now, before you get to the trolley, will you tell us just what part of your body was injured at the time you were struck?

A. Yes. The right side of me. I suffered internal
30 injuries, and my leg, my back and my arms were all bruised.

Q. Were any clothes torn?

A. Yes; my dress was torn.

Q. And you say you were in a daze. I suppose you composed yourself—I don't know—then you went to Pleasantville?

A. Yes, sir.

Q. Then this lady assisted you to where?

A. Why, she assisted me to the trolley and then when we got off the trolley from there up to my home.

Q. You went to your home? What did you do when you got home?

A. I went to bed.

Q. You did?

A. Yes.

Q. And then did you send for a doctor? 10

A. No, I didn't send right away. I didn't think it was anything serious; but then I noticed I couldn't get out of bed and I told my mother. I had not told her anything because I didn't want her to feel bad about it, because she has been very sick and I was afraid.

Q. Then you sent for the doctor?

A. Yes.

Q. What doctor was that?

A. Dr. Haynes. 20

Q. How long were you in bed?

A. About two weeks.

Q. Then after the two weeks, what happened?

A. Why, I was home four or five months. I couldn't walk.

Q. Well, could you go out of the house after the two weeks?

A. No, I couldn't.

Q. Well, how did you get about?

A. Well, I had to walk around—I wouldn't be able 30 to walk around, but when I did start to walk I had to walk with a cane.

Q. How long were you confined to the house by reason of this injury?

A. About four or five months.

Q. Now after these four or five months—were you employed at the time, Miss LaRosa?

A. Yes, I was.

Q. Where were you employed?

A. I was working at the Central Lunch in Pleasantville.

Q. In Pleasantville. Why weren't you working that day?

A. That was my day off.

Q. How much were you making a week at the time?

10 A. Well, they paid me \$10 but it would average about \$25 with tips.

Q. With tips. Now, you were four or five months disabled, as you say; you didn't work those four or five months did you?

A. No.

Q. Now, after that can you tell us where you went to work, if at all?

A. Yes, after that I went to work and started in the Star Knitting Mills.

20 Q. How long did you work there, do you recollect?

A. About four or five months.

Q. How much were you getting a week there?

A. I made \$18 and \$20 a week, but not always; because I had to stay out two or three days out of every month.

Q. I will get to that in a minute. Now, then, from the Star Knitting Mills, can you tell us where you went after that?

30 A. Yes. After that I went to Philadelphia.

Q. To Philadelphia?

A. Yes.

Q. And did you go to work in Philadelphia?

A. Yes, I did.

Q. Where did you work in Philadelphia?

A. Bell Telephone Company.

Q. How long did you work there?

A. About four or five months.

Q. Tell us how much you got a week while you worked there?

A. I made \$18 a week.

Q. Now after that what did you do?

A. After that we came to Pleasantville.

Q. Were you all right then?

A. And after a while I was back, I got a nervous breakdown.

Q. What do you mean? How did you feel? 10
Suppose you tell the jury how you felt during this nervous breakdown that you had.

A. Why, I was in terrible pain and I never knew what I was doing half the time. I was always feeling like in a daze.

Q. How long did that last, Miss La Rosa?

A. About four or five months. I couldn't do any work.

Q. Did you doctor for that?

A. Yes, I did.

20

Q. Well, often or —

A. Well, I went to the doctor's about three or four times and he came to see me.

Q. And why didn't you go more often?

A. I didn't like to go to the doctor's because I am ashamed of doctors. I hate to tell my troubles to the doctor.

Q. I will get to that in a minute. Then after that what did you do, Miss La Rosa, after you had got well, after all this convalescing period, then 30
what did you do?

A. I went to work.

Q. Where?

A. In Baulig's factory.

Q. How long did you work there?

A. I worked from September 5 until November.

Q. And where—why aren't you working now?

A. I have no work. I am not feeling very well. I need a rest.

Q. And there isn't any work?

A. No, there is no work.

Q. Now, that accounts for your time from August 31st, 1926, Miss La Rosa. Now I want to ask you this: During your employments, your various employments, were they always steady? Could you go to work daily and attend to your duties?

10 A. No, I couldn't.

Q. Well, how was that work interrupted, if at all?

A. I had to stay out of work two or three days every month.

Q. Every month?

A. On account of my illness.

Q. Miss La Rosa, you said a moment ago that you were ashamed of doctors and you don't like to tell it. Now, won't you tell these ladies and gentlemen of the jury just why you are ashamed to go? Tell them what is really the matter with you.

20

A. (No answer.)

Q. Now, don't be ashamed.

A. Every month, two or three days, when I have my period, I suffer terrible pains. I would sooner be dead than have pains that I really do get, and I have to keep away from work, and my leg bothers me continually. I can't do anything. I can't stoop, I can't stand still, buying clothes or anything like, for half an hour or more; and I have dizzy spells. My head—oh! I can't hardly stoop. My head bothers me terrible every once in a while. I get such spells that anyone could be talking to me; I know they are talking to me, but I can't understand what they are telling me.

30

Q. Now, Miss La Rosa, do you know who was driving the truck?

A. I was in a daze, but while I was in there I heard

an officer tell them in there who was the driver, and I heard him say that it was Edward P. Cole.

Mr. Lloyd: Well, that is admitted.

Mr. Baratta: You may cross-examine.

Cross-examination.

By Mr. Lloyd:

10

Q. Miss La Rosa, after the accident happened, you, I understood, got a trolley-car and went back home and then you went to bed and stayed in bed for how long?

A. About two weeks.

Q. And then what did you do after you got out of bed at the end of two weeks?

A. I stayed around home.

Q. Around home?

20

A. Yes.

Q. How long?

A. Four or five months.

Q. What do you mean by you stayed around home?

A. Because I wasn't able to walk.

Q. How did you get around?

A. That I had to walk around with a cane, and any time I had to go upstairs my Dad would carry me upstairs.

Q. And that was for that period of four or five months.

30

A. Yes.

Q. So that you were just confined to your house for that period?

A. Yes.

Q. You couldn't go out anywhere for at least four or five months after the accident; is that right?

A. Yes.

Q. No doubt about that?

A. (Witness shakes head from side to side).

The Court: Don't shake your head. Say yes or no so the young man, the stenographer, and the jury may hear you.

10 The Witness: Oh!

Q. You are sure you couldn't go out for four or five months?

A. Yes, I am.

Q. When you did go out at the end of four or five, did you try to get a position?

A. I did, but not right away; but after about two months when I started to walk around—after that I did.

20 Q. Was that two months after the four or five months?

A. Yes.

Q. Then that is either six or seven months after the accident before you got any position at all?

A. Yes.

Q. And whom did you work for then?

A. I worked in the Star Knitting Mills.

Q. When did you go to work for them?

A. I went to work about—about in March.

30 Q. Star Knitting Mills in March, what year?

A. 1927.

Q. March, 1927. And that was the first job that you had?

A. Yes.

Q. Is that right?

A. Yes.

Q. Then you worked there how long?

- A. About four or five months.
- Q. And then where did you go?
- A. After that I went to Philadelphia.
- Q. You mean your family moved up there?
- A. My family moved up.
- Q. Did you go to work up there?
- A. Yes.
- Q. Whom did you go to work for?
- A. Belford Trunk Company.
- Q. How long did you work for the Belford Trunk 10
Company?
- A. About five months.
- Q. You worked there regularly, did you, and
steadily?
- A. No, I didn't.
- Q. By the way, how much were your wages at the
Star Knitting Mills?
- A. \$18 to \$20.
- Q. Did you work on piece work or ——
- A. Piece work. 20
- Q. Or time or just what?
- A. Piece work.
- Q. Your wages there were eighteen to twenty
dollars?
- A. Yes.
- Q. And when you went to the Belford Company
how much were your wages there?
- A. Eighteen dollars a week.
- Q. How much were they when you first started?
- A. I started with fifteen.
- Q. Started at fifteen and worked up to eighteen? 30
- A. Yes.
- Q. So that your time was pretty regular there,
wasn't it?
- A. That was time work I got there.
- Q. What did you say?
- A. I got time work.

Q. But you were increased from fifteen to eighteen?

A. Yes.

Q. Then you stopped working there and what did you do then?

A. We came back to Pleasantville.

Q. The whole family moved back to Pleasantville?

A. Yes.

Q. And have you been doing any work down here?

10 A. Yes. After I got back I had my nervous breakdown and after that about four or five months later I went to work.

Q. Now what year was that in?

A. That was in 1928.

Q. Well, you didn't come back from—oh, yes, you came back from Pleasantville in 1928?

A. Yes.

Q. And you have been working down in Pleasantville since you have been back there; haven't you, except when you were laid off for various reasons?

A. I worked until November, last month.

Q. Until last month. And now you are off again?

A. Yes.

Q. But you have been off and on at various times ever since, haven't you? And you had been previous to this accident?

A. Yes.

30 Q. You had never worked steadily in any one place; had you?

A. Not now.

Q. And you never did before this accident?

A. I did before.

Q. How long were you at this restaurant?

A. I was there about two months.

Q. Whom did you work for before that?

A. I believe it was Baulig's factory.

Q. How long did you work there?

A. Well, I worked there for about two or three years steady.

Q. You worked there for about two or three years steady?

A. Yes.

Q. What is the name of that factory?

A. Baulig's factory.

10

Q. How do you spell it?

A. B-a-u-l-i-g.

Q. L-i —

A. g.

Q. g. Is that the first job that you got there?

A. No, no.

Q. What?

A. No.

Q. Now, isn't it a fact that you went to work for the spinning mills, the Star Knitting Mills in September, 1926, within a month after this accident happened? 20

A. I didn't understand what you said.

Q. (Repeated by the stenographer.) Now, isn't it a fact the you went to work for the spinning mills, the Star Knitting Mills, in September, 1926, within a month after this accident happened?

A. No.

Q. That is not right?

A. No.

30

Re-direct examination.

By Mr. Baratta:

Q. Miss La Rosa, I want to ask you if you ever had any accident before this one?

A. No.

Q. Have you ever had any serious illnesses before this?

A. No.

Q. What was your health generally before the accident?

A. In perfectly condition.

Q. Did you ever have any of these symptoms that you now complain of?

10 A. I never had any of them.

Q. Mr. Lloyd asked you a question about four or five months after the accident, when you said you couldn't work; you said you didn't leave the house—do you mean to tell him that you couldn't leave the house or do you mean to tell him that you had to go around on a cane, and if you did leave it was only for a short time and with great effort?

A. Yes.

Q. What did you mean to tell him?

20 A. I meant to tell him I was around the house. I had to walk around, if I did try, with a cane, and then I couldn't walk very far.

Q. Well, you went to see the doctor during those four or five months, didn't you?

A. Yes.

Q. How far is the doctor from you?

A. Well, it is not very far.

Q. And how would you go there?

30 A. They would have to take—get a taxi to take me there.

Mr. Baratta: That is all.

Re-cross examination.

By Mr. Lloyd:

Q. Now, it is a fact, isn't it, that on September 22, 1926, you worked for the Star Knitting Mills?

A. Yes.

Q. Well, why did you say you didn't for?

Mr. Baratta: That is after the accident, Miss 10 LaRosa, he is asking about.

The Witness: Yes.

Mr. Baratta: Did you work for the Star Knitting Mills?

Q. You worked there on the 22nd of September, 1926; is that a fact?

A. Yes. I must have made a mistake.

20

Q. And you worked there September 29th for that week, too; didn't you, 1926?

A. What was that?

Q. (Repeated by the stenographer). And you worked there September 29th for that week, too, didn't you, 1926?

A. I did not.

Q. You didn't work that week and you didn't get ten dollars that week?

A. No.

Q. What?

30

A. No.

Q. Are you sure?

A. Yes.

Mr. Lloyd: Well, if your Honor please, to save time I will ask to call this witness back a little later

for further cross-examination, and we can go on with the doctors and save time.

By Mr. Baratta:

Q. Was your sister working at the mill, or the Star Knitting Mills, this time that Mr. Lloyd is talking about?

A. Yes.

10 Q. Your sister was working there?

A. Yes.

Q. Is that your record that he has got there or is that somebody else's?

A. I don't know.

Q. You don't know.

By Mr. Lloyd:

Q. Your sister is Nettie; isn't she?

20 A. Yes.

Q. And you are Frances?

A. Yes.

Q. You both worked there, didn't you?

A. Yes.

Q. But you went back to work during the week of September 22, 1926?

A. No.

Q. Why a few minutes ago you said you did.

30 Q. (Repeated by the stenographer from the previous examination of the witness by Mr. Lloyd.) Now, it is a fact, isn't it, that on September 22, 1926, you worked for the Star Knitting Mills?

A. (Repeated by the stenographer.) Yes.

Q. Well, why did you say you didn't for? You worked there on the 22nd of September, 1926; is that a fact? (Repeated by the stenographer from Mr. Lloyd's previous examination of the witness.)

A. (Repeated by the stenographer) Yes; I must have made a mistake.

Q. Now, you say no.

A. But the accident happened in August, 1926. How could it be that I would have went back to work in September? That would have been a month after.

Mr. Baratta: That is exactly what we want to know. You didn't go to work; did you? 10

The Witness: No.

Mr. Baratta: Well, that is what we want to know.

Q. Then you didn't work during the week of September 22, 1926?

A. No.

Q. And you didn't work during the week of 20 September 29th, 1926?

A. No.

Q. At the Star Knitting Mills?

A. No.

Mr. Lloyd: Now, to save time, I will ask that this witness be recalled.

Mr. Bishop: I will reserve my cross-examination.

The Court: All right. Just have a seat, Miss 30
La Rosa.

(Witness withdrawn for the present.)

LELAND MADDEN, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Baratta:

10 Q. Doctor, you practice medicine in Pleasantville; don't you?

A. I do.

Mr. Bishop: I admit his qualifications.

Mr. Lloyd: Yes.

20 Q. You are the family physician of the La Rosa's; are you?

A. Yes.

Q. Did you take care of Miss La Rosa from August 31, 1926?

A. First part of September.

Q. First part of September. Can you tell us what condition you found her in?

A. Yes. I have a record here on the 3rd of September; severe bruises of the right thigh and also on the side, bruise of the shin, bruises of both hips and both iliac crests.

30 Q. Which crest?

A. Iliac crests; and both shoulders; very marked nervous condition. That is the physical examination.

Q. Will you illustrate for me where the iliacs are?

A. Right under here.

Q. Both sides?

A. Yes.

Q. And you treated her—what was her nervous condition first?

A. She was in very nervous condition.

Q. Was she in bed or about when you saw her?

A. She was in bed.

Q. She was in bed. And that was about September 3rd?

A. About September 3rd.

Q. How long did you attend her after that, Doctor?

10

A. I attended her for some time, and at that immediate time—my last office visit was on the 29th of September.

Q. An office visit on the 29th of September. Did she come there accompanied?

A. Yes.

Q. Do you recollect who was with her?

A. Her sister.

Q. What was your diagnosis at the time that you were called in?

20

A. Numerous bruises and nervous conditions due to injury.

Q. Do to injury, traumatic?

A. Traumatic.

Q. And you didn't have a chance to observe whether there were any internal injuries?

A. Nothing that I could find right there.

Q. At that time. It would be a little soon for them to manifest themselves.

30

A. Not necessarily.

Q. I mean with any degree of certainty?

A. It would depend on what internal injuries you might be looking for.

Q. Yes. An injury to the ovary?

A. I cannot always tell about that at the time.

Q. Couldn't you tell about that?

A. Not necessarily.

Q. The concussion of the spine, could you grasp that at the time?

A. I don't think she had any at that time.

Q. Don't think so, at that time?

A. No.

Q. Then you don't know exactly the period you treated her. Do you happen to know how long she
10 was confined to her bed?

A. She was in bed about two weeks.

Q. Could you recollect whether or not she had to walk about with the assistance of some mechanical appliance or device?

A. She was lame because of the bruise on her right thigh.

Q. And had to carry a cane, I suppose; did she?

A. Had to use a cane.

Q. How long did that continue, Doctor, if you rec-
20 ollect?

A. I don't remember whether she had the cane when she was in my office or not; but she was in the office on the 28th or 29th of September.

Q. You knew her before the accident, did you?

A. Several years.

Q. Several years. Was she in good general physical condition?

A. She was.

Q. You have observed her since the accident,
30 haven't you?

A. Yes.

Q. Have you noticed any change?

A. I haven't examined her or looked at her for the last year.

Q. About a year —

A. Before that. If I can refer to my records here maybe it will save some questions.

Q. Certainly. Why not?

A. Saw her at the house about two weeks and she was in the office on the 28th and 28th of September, and I saw her again in March 28th, 1928 (referring to his record.)

Mr. Bishop: March, 1928?

The Witness: March, 1928, March 28th and March 29th at the house; at the office again on April 3rd; and I saw her again on September 18th, 1928. 10

Mr. Bishop: At the home or office?

The Witness: That was at the office the last time.

Q. What did you observe, Doctor?

A. Chiefly the girl's nervous condition later, and she complained, as stated here this morning, of painful menstruation. That is the whole complaint—and sleepless nights. 20

Q. Did she tell you about getting dizzy, a certain amount of vertigo?

A. She also had hysterical attacks.

Q. What?

A. Hysterical attacks.

Q. Hysterical attacks, yes. Now, you attributed that to the shock, I suppose? 30

Mr. Lloyd: Objected to as leading.

Q. Are those symptoms such as could manifest themselves by virtue of some trauma or other in and about the region where she was injured?

Mr. Bishop: I object to that as not being a proper question.

The Court: Objection sustained.

Mr. Baratta: Do I understand that I cannot ask whether those symptoms can be attributed to trauma?

10 Mr. Bishop: The Court is ruling, Mr. Baratta; not I.

Q. What do you attribute those symptoms to, Doctor, having before you the history of this accident?

A. Due to injury.

Q. Due to the injury. That is all.

20 Cross-examination.

By Mr. Lloyd:

Q. Doctor, Miss La Rosa is of Italian parentage; isn't she?

A. Yes.

Q. And isn't it a fact that the Latin races are a highly nervous race?

A. Yes and no.

30 Q. Aren't they generally of a highly nervous temperament, so physically constituted?

A. I will say yes and no. They are very nervous over some things that we might not be disturbed over at all. At other times they are perfectly cool.

Q. Now, you take Miss La Rosa. As she gets older, isn't it quite natural that at the time of her periods that she should have trouble?

A. Not necessarily.

Q. Not necessarily, but it is quite natural; is it not?

A. Not natural; no, sir.

Q. Is it a fact that she has attacks of vertigo and that she is highly nervous and she has headaches at that time abnormal with any woman, Doctor?

A. Abnormal in excessive degree; and all women don't have it.

Q. No, all women don't have it, but they are the 10 most fortunate ones?

A. I cannot figure out the percentage.

Q. Aren't they the more fortunate ones?

A. They are more fortunate.

Q. And it is quite a common thing with women?

A. Not so common to have vertigo, no.

Q. And to have headaches at that time?

A. Common to have headaches and nervousness and back ache.

Q. Now you treated Miss La Rosa, I understand, 20 on three occasions at the house?

A. Four, in September 1926.

Q. Four occasions at the house?

A. And two in March, 1929.

Q. And how many times did she visit the office in September, 1926?

A. Twice.

Q. So that you discharged her after six visits in 1926?

A. No; I did not discharge her.

Q. Well, you didn't treat her further?

A. No.

Q. You didn't take any X-rays, did you, Doctor?

A. No.

Q. You didn't assume it necessary. She was severely bruised?

A. No. I had no X-rays taken.

Q. And if an X-ray had been necessary you certainly would have had it taken, wouldn't you?

A. Yes.

Q. Now, was there anything—any reason why these bruises should not have healed up and didn't heal up normally?

A. The bruises healed up in good order except the one bruise on the front of the right thigh. That was very severe and it extended over quite a number of weeks. I don't remember exactly.

Q. And that took longer to heal than the others?

A. Yes.

Q. That was the most severe bruise?

A. Yes.

Q. That is a perfectly natural condition and it naturally took longer time for that to heal up?

A. Yes.

Q. Do you know, Doctor, that she did work prior to the time that you discharged her on September 20 29th?

A. After her injury, do you mean?

Q. Yes.

A. I don't know she did. I couldn't swear to it.

Q. You don't know?

A. I don't see how she could.

Q. Well, she was out of the house two weeks after the accident, wasn't she?

A. Yes.

Q. And then came to your office on two occasions?

30 A. Yes.

Q. And you saw her again in March, 1928. Is that for the same trouble?

A. Nervous disturbances.

Q. And do you recall whether or not that was at the time of her period?

A. I don't know about that.

Q. You have no memorandum of that?

A. No.

Q. Is there anything that would refresh your recollections as to that?

A. No; I don't think so.

Cross-examination.

By Mr. Bishop:

Q. Do you know approximately the age of Miss Frances La Rosa? 10

A. I have her age here. She was nineteen years at the time of the accident.

Q. Did you see her in any hysterical spells?

A. When? In March, 1928?

Q. March 28th?

A. March, 1928, March 29, 1928.

Q. March 29, 1928?

Mr. Baratta: Hysterical spell, Doctor. 20

Q. March 29, 1928?

A. That was the occasion of two visits of the 28th and 29th of March at her home.

Q. Yes. Prior to that you had not seen her since September 29, 1926?

A. That is right.

Q. Is that true?

A. That is right.

Q. The pain in her periods and disorders of that nature, you, of course, have to take the patient's word for those things; don't you? 30

A. We usually do, yes.

Q. What?

A. We do, yes.

Q. Isn't it altogether probable that a woman or

girl of Miss Frances La Rosa's age, being unmarried, should have a certain amount of pain and disturbance at her periods?

A. Yes.

Mr. Bishop: That is all.

Re-direct examination.

10

By Mr. Baratta:

Q. That is a probability?

A. A probability.

Q. But in a perfectly healthy specimen you do not look for that, do you, Doctor?

A. No.

Q. And you don't need the patient to tell you when she is hysterical, do you, Doctor?

20

A. No.

Mr. Baratta: That is all.

(Witness excused.)

JOHN J. REILLY, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

30

Direct examination.

By Mr. Baratta:

Q. Doctor, how long have you been practicing medicine?

A. About forty years.

Q. Have you been associated with any nervous institutions?

A. Yes, sir.

Q. Would you mind enumerating them?

A. Physical director of Shelldrake Springs Sanitarium in New York, three years; president Sanitarium just outside of New York, about four years; Assistant Superintendent New York City Asylum for the Insane, a little over three; also the colony 10
for epileptics for about a year.

Q. Your association with those institutions has brought under your observation, I suppose, a number of nervous cases?

A. Yes, sir.

Q. Now, did you get a history of this case, Doctor?

A. Yes, sir.

Q. Did you make examination of this patient?

A. I made about four.

Q. Four. Will you tell us just the nature of your examination and what your diagnosis is? 20

A. She was examined by me on November 27th; December 1st; and the 3rd and 4th.

Mr. Bishop: What year?

Q. What year?

A. 1929, just recently. I found after giving her a complete examination — 30

Mr. Bishop: I object to any of the testimony of the doctor's. Here we are almost—we are over three years after the accident has occurred. Now, we have had Dr. Madden. Dr. Madden has testified to what this girl's condition has been; and for

a doctor who knows nothing about the girl and apparently never saw her before, never examined her, wasn't familiar with her or anything else, to come in and testify to what he may find, over three years after it occurred, is objectionable. I object to it. I do not think it is proper.

The Court: I will permit it to show the condition of the plaintiff at this time.

10

Mr. Bishop: Well, what her condition at this time may be is immaterial.

Mr. Baratta: I want to connect her present condition, if your Honor please, with the accident, of course. Otherwise it can have no significance. We appreciate that.

Mr. Bishop: For the sake of the record, may I
20 have an exception?

The Court: Exception allowed.

Q. Now what did you find, Doctor?

A. This girl was suffering from a group of symptoms. She was entirely nervous, and in my opinion

Mr. Lloyd: I object to his opinion, if your Honor
30 please.

A. Well, the result of this examination, if you like

Mr. Lloyd: I am not trying to get you mad at me or anything like that, Doctor.

The Witness: No. I like that.

Q. You like that, eh? Go ahead.

A. She had what is known as chronic traumatic neuro-endocrinous balance. I will explain to the jury.

Q. Yes. We want that explained. Yes, we do want that explained. Start with "traumatic" and just tell the jury what trauma is.

A. Well, given the history of the injury and the 10
time that has elapsed between it and her symptoms
of vertigo, the condition of her eye—she has a be-
ginning exophthalmosis—the occasional sweat-
ing—she speaks of a sensation of warmth—and
vertigo and dizziness, and a marked fatigue that
she has at times—on every occasion she had a
hurried heart or increased beat and increased blood
pressure on my examination—lead me to believe that
that is a true diagnosis of that case.

Q. And that means just what, Doctor? 20

A. Well, it means that this girl will gradually
become progressively worse and may possibly wind
up with some mental derangement.

Q. Will marriage cure this thing?

A. I would say not.

Q. Will it aggravate it?

A. It may aggravate it.

Q. And in all probability the aggravation will
lead to what?

A. Insanity following childbirth. 30

Mr. Bishop: Not what it might lead to.

The Witness: It does lead.

Mr. Bishop: I object to that. We are leading
with probabilities only.

Q. Well, the probability is that marriage and childbirth will do what for this girl?

Mr. Lloyd: I object.

The Witness: It is not words.

The Court: What is the objection?

10 Mr. Lloyd: Leading.

The Court: It is leading.

Q. Tell us the prognosis in the event of marriage and childbirth,—as and meaning what?

A. Meaning possibly that she would have an attack of acute mania or dementia immediately after childbirth.

20 Q. Now, does the nature and the picture of this injury presuppose or suggest to you an injury to some major gland of the body, Doctor?

Mr. Lloyd: I object. It is leading.

The Court: Yes.

Q. Would you mind going into the nervous system a little bit and its counterpart, don't you know, so the jury will grasp what we are trying to get?

30 A. If you take the function of the diagnosis—that has to do with the glands, the effect of some trauma, physical or psychic. They are both concerned.

Q. Yes. Now, if you take these glands and disturb one of them, we will say, what is the result then?

A. Loss of function. It does not perform the duty.

Q. Does not perform its duty. And when it does

not perform its duty what happens with relation to the other glands in the system?

A. Well, they sympathetically, or because of either the increased amount of hormones or decreased amount, suffer correspondingly or secondarily.

Q. Then take this balance to the glands. What happens to the nervous system?

A. Then there is a train of systems that all goes down—a complex condition. 10

Q. Then what happens?

A. They suffer the symptoms that Miss La Rosa presents, loss of weight and nervousness, mental irritability or emotional instability, if you like; then these attacks,—these emotional attacks. They are not defined well. They are called false hysteria. Men who have studied that don't call that hysteria. That is purely symptomatic; not an entity but a symptom.

Q. And her present condition in your opinion is 20 due to what sort of injury, if any?

A. Probably an injury primarily several years ago to the mind and its membranes—the head or its membranes, the brain or its membranes.

Q. What kind of injury to the spine?

A. Concussion resulting.

Q. Do these symptoms that this young lady complains of, come on suddenly or gradually?

A. They take several years.

Q. An insidious thing? 30

A. Yes, progressively worse.

Q. And do they manifest themselves more and more?

A. More and more, yes.

Q. Your prognosis is that this girl will get better or worse?

A. My prognosis is that this girl will get worse.

Cross-examination.

By Mr. Lloyd:

Q. Do you know Dr. Madden?

A. Yes.

Q. Reputable physician?

A. Yes.

Q. Not a plumber or butcher who doesn't know
10 his job?

A. No, sir.

Q. You think he knows his job; do you?

A. (No answer.)

Q. You came from New York?

A. Yes.

Q. What did you leave New York for?

A. I went with the Rockefeller Institute and went
to South America for them.

Q. Why? Why?

20 A. Simply because I was making research study
at the time.

Q. You are an obstetrician?

A. No.

Q. Have specialized at all in obstetrics?

A. No, sir.

Q. The reason I asked you, you were speaking
about these glands. How long have you been in
Atlantic City?

A. Ten years, I think.

30 Q. Connected with any institutions there?

A. No, sir.

Mr. Lloyd: That is all.

The Witness: I have my own hospital.

Re-direct examination.

By Mr. Baratta:

Q. You have an institution of your own?

A. Yes; I have a clinic.

Re-cross examination.

By Mr. Lloyd:

10

Q. Is that recognized by the American Association of Hospitals?

A. It is as much as any of them. I am a registered physician.

Q. Is it recognized at all by the American Hospital Association?

A. As much as any private hospital would be.

Q. Can't you answer that yes or no?

20

A. I don't know that it is not.

Q. Do you know that it is?

A. I suppose so.

Q. Can you answer that question yes or no?

A. Well, what difference does it make whether it is recognized or not?

The Court: Just answer the question, Doctor.

By Mr. Baratta:

30

Q. You have answered his question. You have told him just as much as any other, and that is sufficient for him to know.

Mr. Lloyd: We apparently have two judges, if your Honor please.

By Mr. Lloyd:

Q. Is it recognized by the American Association of Hospitals?

A. I don't know.

Q. You know it is not, don't you?

A. I don't know that.

Q. And the first you ever saw of Miss La Rosa was on November 27th, about a week ago?

10 A. Yes, sir.

Mr. Lloyd: That is all.

Cross-examination.

By Mr. Bishop:

Q. Are you the sole owner of this hospital?

A. Am I?

20 Q. Yes.

A. Several others.

Q. All business dealings come within your personal knowledge?

A. All the professional dealings come under me. I am the Director.

Q. Would you call the registration with the American Hospital Association a professional duty?

A. Not necessarily.

Q. Would you call it a professional duty?

30 A. I would call it a professional duty, but it is not necessary to register a hospital.

Q. Then it would come within your personal knowledge?

A. Yes.

Q. Have you a certificate from that association?

A. No, not for the hospital. I have been a member of it for a good many years.

Q. You have not a certificate for your hospital from that association?

A. No. It is not necessary to operate it.

Q. I am not asking you that, Doctor. Do you belong to the Atlantic County Medical Association?

A. I do not, I am glad to say.

Q. American Medical Association?

A. I do not, I am glad to say.

Q. I guess the feeling is mutual.

A. Not necessarily.

Q. Doctor, in your opinion, if a normal, healthy young female of the age of Miss La Rosa and of her characteristics, receives an injury such as has been described by her here today, and as a result of that injury she several days after the receipt of the injury calls in a doctor for the first time; that that doctor sees her over a period of a little over a month and thereafter does not see her until over a year from that time and then only for two visits; and thereafter for only two visits more, is it probable that the disease or diseases and conditions which you have described as Miss La Rosa having, would come from such an injury?

A. Yes, I believe it could follow.

Q. Is it probable?

A. From the history described.

Q. Yes or no?

A. I have seen such cases. I have seen such cases.

Q. I want a yes-or-no answer to my question.

A. Yes, yes.

Mr. Bishop: I will ask the Court to rule.

The Witness: It is probable.

Q. How many cases like it have you seen?

A. About a dozen.

Q. How many cases of similar injury have you seen?

A. Well, probably twice that much.

Q. Only twice that much?

A. Yes.

Q. Is that all?

A. Yes. These cases are not very common.

Q. What do you mean? A woman with bruises
10 is not very common?

A. I am talking about my statement of what I find at the present examination.

Q. All she has described is bruises and all Dr. Madden has described.

A. She describes a three-or-four-months period of convalescence and nervousness and fatigue and loss of weight. She describes that in her history very carefully.

Q. That is not her injuries, is it?

20 A. Following these injuries, secondarily; the sequela of them.

Mr. Bishop: All right.

Mr. Lloyd: No further questions.

By Mr. Baratta:

30 Q. Doctor, you are not willing to state that one could receive a blow such as this young lady received and come out unscathed, are you?

A. No, sir.

Mr. Baratta: That is all.

By Mr. Lloyd:

Q. You are willing to say almost anything; aren't you, Doctor?

A. I would not say that; no, sir.

Mr. Baratta: Now, that is uncalled for.

The Witness: I will ask the protection of the Court.

10

Mr. Baratta: If your Honor please —

The Court: Make your objection to the Court.

Mr. Baratta: If your Honor please —

The Court: If you object to the question, the objection is sustained.

Mr. Baratta: I object to the remark, not to the question.

20

The Court: Strike it from the record.

The Witness: I object to that.

Mr. Lloyd: I will object, too. Then we will all be objecting.

Mr. Baratta: I think, if your Honor please, if we confine ourselves to the case rather than the side lights and animosities that may exist between personalities, we will do better. I do that as a humble suggestion.

30

Mr. Lloyd: It is not between you and I, John.

Mr. Baratta: I know it is not between you and I; because we will probably shake hands and have lunch when it is all over.

The Court: No comments, gentlemen. Call your next.

(Witness excused.)

- 10 Mr. Bishop: At this time I want to call Dr. Allman in my case, with the understanding that it will not interfere with my motion to non-suit if I should make such a motion; in other words, that my case will only be considered open if after the defendant's case has rested completely I open it.

20 The Court: In other words, you submit the testimony in case it is necessary for you to use it; otherwise you would like to have it stricken out? Is that agreeable?

Mr. Lloyd: Yes, that is perfectly agreeable to me.

The Court: (Repeated by the stenographer.) In other words, you submit the testimony in case it is necessary for you to use it; otherwise you would like to have it stricken out? Is that agreeable?

- 30 Mr. Bishop: Yes. In other words, my case is not open. This is not an opening for the purpose of my making a motion for a non-suit at the close of your case.

Mr. Baratta: If I should fail in any of my elements, you still want to move for a non-suit? Certainly.

The Court: And that the testimony of Dr. Allman shall be stricken from the record.

Mr. Bishop: Well, it would be considered as not having been entered.

The Court: Is that agreeable to you?

Mr. Baratta: Yes, sir.

10

DAVID B. ALLMAN, called as a witness on behalf of the defendant, Burk Motor Company, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Bishop:

20

Q. Dr. Allman, what is your profession?

A. Surgeon.

Q. And physician?

A. Physician.

Q. What institution did you secure your medical training at?

A. Jefferson Medical College.

Q. Graduated from there when?

A. 1914.

Q. Will you give me an outline of your work since then, where you have been, what institutions you are connected with and tell us who you are? 30

A. Resident physician of Atlantic City Hospital from 1914 to 1915; Assistant Chief there for—until the war.

Q. Assistant chief of what?

A. Atlantic City Hospital, surgeon.

Q. Surgeon?

A. Served in the navy during the war. Returned and became —

Q. As a doctor?

A. Yes. Returned and became attending gynecologist at the Atlantic City Hospital and then became surgical chief, which position I still hold. In addition to being consulting surgeon at the Atlantic
10 County Tuberculosis Hospital and Atlantic County Almshouse, the Children's Seashore Home, North American Home; surgeon of the Betty Bacharach Home; Medical Director of the Betty Bacharach Home, I was Assistant Beach Surgeon for three years. That is about all.

Q. A member of the Atlantic County Medical Association?

A. Yes.

Q. Of the National Association?

20 A. Yes.

Q. Your practice in addition to surgery has been that of a general practitioner as well?

A. Yes.

Mr. Baratta: Let me cross-examine, please.

By Mr. Bishop:

Q. And you are a member of the American Medical Association?
30

A. Yes.

Mr. Bishop: Cross-examine on the qualifications.

Cross-examination as to qualifications.

By Mr. Baratta:

Q. You are a surgeon at the Atlantic City Hospital?

A. At the present time, yes.

Q. Surgery is your specialty?

A. Yes.

Q. You are not a diagnostician? 10

A. Oh, yes.

Q. How long have you been specializing in diagnostics?

A. You don't specialize that. That is the beginning of every specialty.

Q. That is the beginning of every specialty. Are you an endocrinologist?

A. No.

Q. Have you ever done any research work in endocrinology? 20

A. No.

Q. Are you a neurasthenic?

A. Neurasthenic?

Q. Are you a neurologist?

A. No.

Q. Do you specialize in neurology?

A. No.

Q. Do no research work along those lines?

A. No.

Q. Now, who are the Bacharachs? What relation are they to you? 30

Mr. Lloyd: I object. That certainly is immaterial.

Mr. Baratta: They started to make aspersions

when they put my man on the stand, and I am allowed to do the same thing in counterbalance.

The Court: I think that is entirely foreign to this case. I will sustain the objection. You can take care of that in your argument.

Mr. Bishop: I do not object to his stating his relationship.

10

Mr. Lloyd: Then I withdraw my objection. I thought we were just saving a little time.

The Court: It is immaterial. You are taking up the Court's and the jury's time unnecessarily by that question. Do you wish to press it?

Mr. Baratta: I wish to press it for the effect that it might have; just so much so in counterbalance of the effect of what questions these gentlemen might have asked of a like nature of my physician; might be neutralized.

20

Mr. Lloyd: We have no objection.

The Court: That is a matter of argument. I won't permit the question.

Mr. Baratta: All right.

30

The Court: Continue your cross-examination as to qualification.

Q. Then you are not a neurologist, you are not an endocrinologist, and your activities now are confined to purely those of a surgeon in which you specialize, I take it?

A. Not confined purely.

Q. Well, I mean so far as specialization is concerned?

A. Yes.

Q. And you do some work in general practice of medicine?

A. That is right.

Mr. Baratta: Now, go ahead from that point. 10

Direct examination (resumed).

By Mr. Bishop:

Q. (Repeated from the cross-examination of Dr. Reilly) Doctor, in your opinion, if a normal, healthy young female of the age of Miss LaRosa and of her characteristics, receives an injury such as has been described by her here today, and as a result of that injury she several days after the receipt of the injury calls in a doctor for the first time; that that doctor sees her over a period of a little over a month and thereafter does not see her until over a year from that time and then only for two visits; and thereafter for only two visits more, is it probable that the disease or diseases and conditions which you have described as Miss LaRosa having, would come from such an injury? 20

A. No, I don't think it is. 30

Q. Is it probable that pain at her periods would increase in a woman of Miss LaRosa's age between the time of the accident and the present time? Is that question clear?

A. Yes. It is probable it would.

Q. In your opinion what would be the probable re-

sult of marriage and childbirth on Miss LaRosa, as to being beneficial or harmful to her?

A. I feel it would be beneficial.

Mr. Bishop: Cross-examine.

Cross-examination.

10 By Mr. Baratta:

Q. Is Dr. Madden a reputable physician, Doctor?

A. He is.

Q. He has been practicing medicine a number of years?

A. He has.

Q. Is his opinion worthy of some weight?

A. It is.

20 Mr. Lloyd: If your Honor please, I don't think it is quite proper for one doctor to comment on the testimony of another doctor.

The Court: You are asking this witness's opinion as an expert.

Mr. Lloyd: His opinion, and there was no objection to his opinion as an expert or as a layman. I would not care which, concerning Dr. Madden.

30 The Court: I will permit the question.

Mr. Lloyd: May I have an exception for the sake of the record?

Mr. Bishop: I would like to have an exception to the same ruling.

The Court: Exception allowed.

Q. Doctor Madden testifies to a question involving the same points as the question asked you a moment ago, that Miss LaRosa's condition ——

Mr. Lloyd: I object to this question.

Q. —is due to the accident. Do you differ with him, Doctor? 10

The Court: Just a minute, Mr. Baratta.

Q. (Repeated by the stenographer) Dr. Madden testifies to a question involving the same points as the question asked you a moment ago, that Miss LaRosa's condition is due to the accident. Do you differ with him, Doctor?

Mr. Lloyd: That is objected to because the Doctor didn't testify to any such thing, and, further, that one witness cannot certainly comment on the testimony of another witness in the trial of any suit. 20

The Court: I believe the Doctor did testify that the condition of the plaintiff was due to the injury received. That is my understanding of the testimony.

Mr. Baratta: That is my understanding, too, if your Honor please. 30

Mr. Lloyd: I understood Dr. Madden to say possibly.

Mr. Baratta: No. He says due to the injuries.

Mr. Lloyd: But I won't press my objection on that ground. My objection is to one witness expressing any opinion as to any other witness in the trial of any cause.

The Court: And what is your objection?

10 Mr. Bishop: My objection is that it is not my understanding of the testimony that Dr. Madden attributed the diseases to the injury; that Dr. Reilly did; and that, therefore, Mr. Baratta's question as to what Dr. Madden said is not accurate.

The Court: I will permit the question.

Mr. Lloyd: Exception.

Mr. Bishop: Exception.

20 The Court: Allowed.

Q. (Repeated by the stenographer.) Dr. Madden testifies to a question involving the same points as the question asked you a moment ago, that Miss LaRosa's condition is due to the accident. Do you differ with him, Doctor?

A. Yes.

Q. You differ with him?

A. Yes, if he says that.

30

Mr. Baratta Well, just refer back —

Mr. Lloyd: "My opinion is different", he says. I do not care what he says.

Q. Then it is possible for two doctors to differ?

A. It is possible, yes.

Q. And you can both be conscientious in your belief?

A. Yes.

Q. Then you and Dr. Reilly can both be conscientious in your belief?

A. I can only speak for myself.

Q. You may be wrong?

A. Certainly.

Q. And there may be many symptoms in this case that you didn't grasp? 10

A. Possibly.

Q. You may have missed some. Did you look for concussion of the spine?

A. Concussion of the spine is something that is manifest immediately after the accident.

Q. Well, did you see her after the accident?

A. No.

Q. When did you see her, Doctor?

A. May I refer to my notes to be accurate?

Q. Refer to your notes. 20

A. On March 3, 1928, and January 28, 1929.

Q. March 3, 1928 and January 28, 1929?

A. March 3, 1928, and January 28, 1929.

Q. Now, for over a year and a half after the injury—we both mean about a year and a half after the injury. And at that time would a concussion of the spine have started to manifest itself?

A. Oh, yes; it occurs immediately if it occurs at all. It is like concussion of the brain.

Q. It is not possible for one to receive a concussion of the spine and be in a dazed condition for a moment or so and seem all right, and a couple of days after for it to manifest itself in various symptoms? 30

A. That could be, yes.

Q. It could be. And it could have been in this case?

A. No. She did not have the symptoms.

Q. Well, you didn't see her after the accident?

A. Well, I am talking about when I saw her.

Q. Oh, when you saw her. But she was in bed for two weeks after the accident and this thing didn't manifest itself in this serious state until two days after. Is that an uncommon thing in concussion of the spine?

A. Yes.

10 Q. It is uncommon?

A. Very.

Q. How many cases have you seen of concussion of the spine?

A. Probably two or three hundred.

Q. And you have never seen concussion of the spine manifest itself like it has in this case?

A. None that I can recall.

Q. None that you can recall out of all your experience. And is concussion of the spine one of
20 those things that manifests itself suddenly or very openly?

A. Usually more or less openly to a trained mind.

Q. Usually more or less openly to a trained mind. But it can manifest itself suddenly without your grasping it right away?

A. In a very mild form it might, yes.

Q. And it can go on and get worse and worse, can't it?

A. I never heard of it.

30 Q. You never heard of it?

A. No.

Q. One's spine is injured and one comes out unscathed? You never heard of any case where somebody's spine was hurt and the symptoms start to manifest themselves, on and on and on until the patient got worse with perhaps some instability to the nervous system?

A. Not unless the evidence was there at the time of the accident.

Q. But you didn't see her at the time of the accident?

A. I didn't say I did.

Q. What?

A. I didn't say I did.

Q. If you didn't see her at the time of the accident, how can you tell me that there was no concussion of the spine—oh, you don't say there wasn't 10 any?

A. I say she didn't have any at the time I saw her.

Q. But you don't say there wasn't any?

A. I don't know what she had.

Q. You don't know what she had. Now, the next thing I want to ask you, what are the three important glands in a woman?

A. I wouldn't say that there are any three important ones. They are all important. 20

Q. Well, tell me the three important glands if I enumerate them—you can't say three important?

A. There is the thyroid.

Q. Is the thyroid important?

A. Yes.

Q. Are the adrenals important?

A. Yes.

Q. Are the ovaries important?

A. Yes. There are others more important, however. 30

Q. Please confine yourself to these three. If I should strike an imbalance in one, if I should strike a function, an improper function in one, would I disturb the other two?

A. Yes.

Q. And if I disturb the other, I would in turn disturb the nervous system?

A. Not necessarily.

Q. Aren't the glands connected up?

A. They do compensate.

Q. Then there is balance between the two?

A. Yes. That is correct.

Q. What controls them?

A. The internal secretion.

Q. If there is some impairment to the internal secretions, there is a disfunction?

10 A. Yes.

Q. And this disfunction happening must naturally react on the nervous system?

A. Yes.

Q. Well, in all probability it will?

A. It may, temporary, but that is all.

Q. Temporary, but it will?

A. It might.

Q. There is a compensation; there is a cause and effect there?

20 A. Yes.

Q. Tell us the etiology of the same. Let us not waste time. Now, please, is that not true?

A. What do you mean by the etiology of it?

Q. The science of cause and effect that connect the causal relationship. These are philosophical terms. Good heavens! We don't need medicine for this. Now, if there is some injury to one of those glands, the others are disturbed; aren't they?

A. Temporarily.

30 Q. Temporarily. Now, then, if the others are disturbed, the nervous system is disturbed, isn't it? On that compensation theory you just advanced?

A. Not necessarily.

Q. Would it in all probability?

A. It would depend on the manner of the disturbance.

Q. Would you look for it, as a specialist, if somebody told you a gland was injured?

A. You would look for it, yes.

Q. Why, of course you would. Now, the next thing that happens, there is this imbalance between the nervous system and these glands?

A. I didn't say that.

Q. In the secretions there is an imperfect emission, if you like. Perhaps the glands are ductless. The endocrine glands we are talking about. But there is some disturbance in the secretion? 10

Mr. Bishop: If your Honor please, there is no evidence of any such disturbance.

Mr. Baratta: I am going to connect it up, gentlemen.

Q. Having before you a picture of this accident and this girl struck the way she was struck, wouldn't it in all likelihood be that her ovaries were somewhat shaken up or disturbed or in some way affected? 20

A. I don't believe so, no.

Q. Remember she was struck once and pinned against the wall and the car backed up and pinned her up again with such force that it crumpled in —

Mr. Bishop: There is no such testimony as this. 30

The Court: You must modify your questions, Mr. Baratta.

Q. Suppose the patient received such a blow from which there could come some damage to the ovary.

Mr. Lloyd: That is objected to on the ground we are not dealing with suppositions.

The Court: You are asking for an opinion from this witness. I will permit it.

Mr. Lloyd: But this is not a hypothetical question. This is merely a supposition. Now, anything might be supposed.

10 The Court: I will permit the question.

Mr. Lloyd: For the sake of the record, I ask an exception.

Mr. Bishop: Exception.

20 Q. Suppose she received a blow in and about the section where the ovaries are, would the fact that this girl showed this pain, this disfunction—wouldn't that tell you that she had received some injury to the gland?

Mr. Lloyd: That is objected to on the ground there is no such testimony, and we are still dealing in suppositions.

Q. Would the fact that she was ——

30 Mr. Lloyd: Wait until the objection is ruled on, please.

The Court: I will permit the question.

Mr. Lloyd: Exception.

Mr. Bishop: Exception.

The Court: Exception allowed.

Q. Receiving such a blow such as this girl received —

Mr. Lloyd: That starts out bad. The doctor does not know what sort of blow this girl received.

Mr. Baratta: He does not know? Then what is he testifying to, if he does not know? 10

Mr. Lloyd: He did not see it.

The Court: Won't you please properly frame your question. Now, you have asked four or five question, and you have not permitted the witness to answer any one of them.

Mr. Baratta: I have, but these gentlemen have interrupted me. 20

The Court: You frame a proper question and we will get an answer, for this jury.

Q. Did you get a picture for this jury—let me ask you this: does weight have anything to do in a traumatic injury, weight of the force?

A. Which question do you want to have answered?

Q. Answer this one.

A. Yes.

Q. It does. Does position of the recipient have anything to do with it? 30

A. Yes.

Q. Does the speed with which the object lands upon the body have anything to do with it?

A. Yes, sir.

Q. Then, we have speed, we have weight and we

have position of the recipient. Does the location on the body where the recipient received the blow have anything to do with it?

A. Yes.

Q. Those are all things which you must determine in these traumatic injuries; is that right?

A. That is correct.

Q. Do you know anything about these elements?

10 A. About what?

Q. About these elements we have talked about—speed, force, position of the recipient and location of the blow?

A. I suppose I know what the average person knows, yes.

Q. Well, do you know about this one here?

A. Only what I have heard.

Q. Well, that is all. I don't want to hear any more. I am through.

20 (Witness excused.)

(Recess to 1:45 P. M.)

AFTER RECESS.

EDWARD P. KOHL, called as a witness on behalf of the plaintiff, being sworn, was examined and
30 testified as follows:

Direct examination.

By Mr. Baratta:

Q. What is your full name?

A. Edward P. Kohl.

Q. Where do you live?

A. 126 North Somerset, Ventnor.

Q. You are a defendant in this suit?

A. Yes, sir.

Q. Do you recollect an accident on or about August 31, 1926?

A. I do.

Q. Who was in that accident?

A. Why, I was driving the car. John Diebold was sitting along side of me, the instructor. 10

Q. And whom did you strike?

A. Girl known as Miss Frances LaRosa.

Q. Where did it happen, Mr. Cole?

A. Where the driveway crosses the sidewalk at the Henkleman Building between Arkansas and Missouri Avenue.

Q. Between Arkansas and Missouri Avenue in Atlantic City?

A. Atlantic City.

Q. That was in August, wasn't it? 20

A. It was.

Q. About what time of the day?

A. I don't know exactly, I don't recollect.

Q. In the forenoon or afternoon?

A. I think it was in the afternoon.

Q. In the afternoon. Where do you live now?

A. Same address.

Q. 126 North Somerset Avenue, Ventnor?

A. Yes, sir.

Q. How long have you lived there? 30

A. Four years.

Q. Before that, where did you live?

A. St. James Place. 119 St. James Place, Atlantic City.

Q. And your business is what?

A. Superintendent for John R. Livezey.

Q. Are you his local representative in Atlantic City?

A. I am.

Q. Do you recollect the automobile in which you were riding at the time?

A. I do.

Q. And the automobile that figured in this accident, of course?

A. Yes.

10 Q. You used it, I suppose, after the accident?

A. I did.

Q. Was it assigned to your wife after the accident?

A. In what way do you mean?

Q. You used it in the business of John R. Livezey after the accident?

A. I did.

Q. Whose name was on that automobile at the time of the accident?

20 A. John R. Livezey.

Q. Inscribed clearly thereon?

A. Yes.

Q. What was your business—how long before the accident had you been working for John R. Livezey?

A. From September, 1910.

Q. From September, 1910, until what date?

A. From September, 1910, until the date of the accident.

30 Q. And you are still in his employ?

A. Yes.

Q. What was your business as local representative of Mr. Livezey?

A. Well, I went around trying to get, to secure business. I estimated jobs and saw that they—that we got the work and I saw that the work was done satisfactorily.

Q. And you were learning to drive, in furtherance of Mr. Livezey's business?

Mr. Lloyd: I object.

Mr. Bishop: Objected to as leading.

Q. What purpose did you have in learning to drive?

10

Mr. Bishop: There is no testimony that he was learning to drive.

Q. How long had you driven a machine before the date of the accident? How many times before?

A. Two or three.

Q. Two or three times?

A. If I recollect exactly.

Q. At the time of the accident, were you or were you not being taught or learning how to drive?

20

A. I was under instruction.

Q. From whom?

A. John Diebold.

Q. Now, for what reason were you learning to drive, Mr. Cole?

A. For the benefit of the business in Atlantic City.

Q. For the benefit of John R. Livezey's business?

30

Mr. Lloyd: Well, that is a conclusion.

Q. For the benefit of whose business?

Mr. Lloyd: That is objected to. It certainly would be a conclusion on the part of this witness.

Mr. Baratta: If your Honor please, the witness says he was employed by John R. Livezey and that he had been so employed since 1910, and was employed by him at the time of the accident, and he is in an automobile that at this point in the testimony belongs to John R. Livezey by virtue of the fact and the presumption that arises, having affixed John R. Livezey's name thereon.

10 Mr. Lloyd: Well, he has admitted all that.

Mr. Baratta: Now, the thought is for whose benefit was he learning to drive? I want to establish thoroughly this relationship of master and servant, if your Honor will permit me.

20 Mr. Lloyd: If I learn how to drive an automobile it certainly is for my own benefit as well as for the benefit of possibly every client I may have. For instance, if I have to get down at a certain hour and I can't get a train, if I drive my own car it is certainly much cheaper than to have me hire somebody else. It seems to me it is apparent nowadays that it is to a man's own benefit to know how to drive a car.

Q. Of course, you wanted to learn to drive for your own benefit, didn't you, Mr. Cole?

30 A. Partly.

Q. And what was the other part —

Mr. Lloyd: That is objected to.

The Court: I will permit that.

Mr. Lloyd: Exception.

Q. What was your chief purpose in learning how to drive?

A. To get around and cover more territory.

Q. For whom?

A. For the benefit of my employer.

Q. Now, did your employer send you down to be taught to drive, or did you go of your own initiative?

A. I met my employer at the Burk Motor Company at the time he purchased the car. Arrangements were made at that time to furnish an instructor to teach me —

Mr. Bishop: I ask that the answer be stricken out.

The Court: What part of it is not —

Mr. Bishop: I don't think any of it is.

20

Q. Tell us how you came to be taught to drive the car?

A. At the time of the purchase, Mr. Livezey phoned me to meet him at the Burk Motor Company. I went there, met Mr. Livezey, was introduced to Mr. Burk, and in turn to Mr. Thomas Bannon, who was designated as my instructor to teach me to drive.

Q. Mr. Burk was there himself?

A. At that time.

30

Q. When these arrangements were made?

A. Yes.

Q. And did Mr. Burk tell you the Burk Motor Company would teach you to drive?

A. He didn't say the Burk Motor Company.

Q. He said they would teach you to drive?

The Court: Just a minute, Mr. Baratta. Ask this witness what was said.

Q. What did they say there?

Mr. Lloyd: I think the witness has already testified Mr. Burk designated Mr. Bannon to teach him to drive.

10 The Court: That is my understanding.

Q. Having designated Mr. Bannon, did Mr. Bannon take you out and instruct you, ever?

A. On two occasions.

Q. On two occasions. Where would you report when you wanted instructions?

A. There was no appointing arrangement made. When I had the time to stop there and it was agreeable to him, to Mr. Bannon, if it was we would go out.

20 Q. Where would you go and ask for these instructions?

A. In the Burk Motor Company place. Henkleman Building, and ask for Mr. Bannon.

Q. Did you go on the date of this accident?

A. I did.

Q. Did you ask for Mr. Bannon then?

A. I talked with Mr. Bannon.

30 Q. And what did Mr. Bannon do?

Mr. Lloyd: I object to that.

A. Told me that he had —

Mr. Bishop: I object to what he told him.

The Court: Yes. As a result of your talk with Mr. Bannon, what took place?

Mr. Baratta: Well, Mr. Bannon was the agent of the Burk Motor Company in teaching this man to drive, and this conversation that took place with Mr. Bannon certainly must bind the company because it was made by the agent in the scope of his employment. It is a question involving the teaching of this man to drive. However, I will get to that 10 point.

Q. As the result of your conversation with Mr. Bannon, what happened?

A. Mr. John Diebold went with me on that date as instructor.

Q. As the instructor. Do you know whether or not that was the sense of the Burk Motor Company?

A. I do not.

Q. Had you left from the Burk Motor Company's 20 place?

A. Yes.

Q. And you proceeded to drive the automobile from the place, did you or didn't you?

A. I did not.

Q. When was the automobile given over to you that day?

A. As far as I can recollect, it was down below Albany Avenue.

Q. And you drove it up from Albany Avenue 30 along Albany Avenue—or Atlantic Avenue?

A. On the return, yes.

Q. On the return back to the Henkleman Building?

A. Yes.

Q. And you had driven the car how many times up to that point?

A. Two or three.

Q. Two or three?

A. I think that was the fourth time.

Q. You think that was the fourth time. And you undertook to drive the car down Atlantic Avenue?

A. I did.

Q. And your instructor permitted you do to it?

A. He did.

10 Q. Did you remonstrate with him or say, "I don't want to do it?"

A. No.

Q. Didn't he say to you, "Don't do it"?

A. No.

Q. Then the two of you acquiesced in your having the car; is that it?

A. Well —

Q. Yes.

A. I relied on his judgment, not on mine.

20 Q. And you drove it up Atlantic Avenue. How was the traffic that day when you got up by the Reading? Was it pretty heavy?

A. Not particularly heavy.

Q. Now, I will ask you to describe for the jury here so we will get the picture of this Henkleman Building. You were coming down Atlantic Avenue that way. See, this is west and this is east, up here at the Inlet; and this is south and this is north. You turned in here; is that right?

A. Right.

30 Q. This is a solid building, isn't it, the Henkleman Building, a solid building?

A. There is a driveway.

Q. But just a driveway of box-like dimension, the whole building is not open all the way up?

A. No.

Q. Just a box-like dimension; under the first floor; is that right?

A. Yes.

Q. How many feet wide is that?

A. Seven.

Q. And how high?

A. I don't know.

Q. So, it is a box-like opening?

A. Yes.

Q. Do you remember a rain spout alongside of the —

A. I know there is one there. 10

Q. How many times did you strike Miss LaRosa?

A. I think twice.

Q. Do you remember whether or not after you struck her that rain spout was bent in?

A. It was bent afterward. It may have been bent before.

Q. But you know it was bent after?

A. Yes.

Q. But you don't know whether it was bent before? 20

A. I have seen it many times since that.

Q. You have seen it many times since that, and this bend; but you don't know whether it was bent before?

A. No.

Q. Now, didn't you think, Mr. Cole, that it was a dangerous thing that day to drive that car down Atlantic Avenue?

Mr. Lloyd: That is objected to as a conclusion. 30

The Court: I sustain the objection.

Q. As you came on to the sidewalk, was there anything blocking your view here alongside of this opening?

A. No.

Q. Were there cars parked around here so that you would have to make a sort of a sweep to get in?

A. I don't know whether there were cars parked within thirty feet.

Q. Then you had a perfect view here and saw everything that was going on?

A. I did.

Q. Did you see Miss LaRosa?

10 A. I didn't know Miss LaRosa at the time.

Q. But did you see her here?

A. I saw several people coming along.

Q. And why didn't you stop instead of going up there and give the car over to the instructor?

A. Because I thought I was competent to make the turn.

Q. Do you know whether or not Mr. Diebold was employed there at the Burk Motor Company before that day that you took the car?

20 A. I do not.

Mr. Baratta: All right. Cross-examine.

Cross-examination.

By Mr. Bishop:

Q. You have never been employed by the Burk Motor Company, have you, Mr. Cole?

30 A. I have not.

Q. You weren't their servant or agent or employe on the date of this accident?

A. I was not.

Mr. Baratta: That is a legal conclusion as to whether or not he was a servant and agent or em-

ploye. I certainly can make you my agent or employe without undergoing the formalities of a hiring.

Mr. Bishop: Well, he has answered it.

Q. Were you on any business of the Burk Motor Company that day?

A. I don't understand what you mean by the question. 10

Q. Were you doing anything with that car that day for the benefit of the Burk Motor Company?

Mr. Lloyd: That is a conclusion.

The Court: Objection sustained.

Mr. Bishop: Allow me an exception.

The Court: Allowed. 20

Q. I understand you previously testified that Mr. Livezey owned the car that you were driving that day?

Mr. Lloyd: That is a conclusion. If you do not know, say so.

A. I don't know what arrangements had been made.

Q. You don't know? 30

A. I don't know.

Mr. Bishop: I don't think there is any further question.

Cross-examination.

By Mr. Lloyd:

Q. When you came up to that garage entrance, did you—and you saw these people coming, did you stop and think, “Well, now” — Did you have time to stop and think, “Can I drive this car in safely?” Or did you, in the natural course of your
10 driving, merely start to go in?

A. I was going at a very slow rate of speed and didn’t have any idea that I couldn’t drive in there.

Q. You were driving then on a learner’s permit?

A. Yes, sir.

Q. That is right. How long after this did you get a license?

Mr. Baratta: That is immaterial. I object to
20 that.

The Court: I will permit it.

Mr. Baratta: Exception.

A. About a month.

Q. About a month. Where did this automobile remain until you got a license?

A. Burk Motor Company.

30 Q. Was it delivered to you or to Mr. Livezey before you got your license?

Mr. Bishop: I object to that part, “delivered to Mr. Livezey.” That would be a conclusion on something that would not be in his knowledge.

The Court: Sustain the objection.

Q. Was the automobile delivered to you before you got your license?

A. Not a physical delivery.

Q. It remained in the Burk Motor Company's possession until you got your license?

A. It did.

Q. And after that did you take it away from there?

A. I did.

Q. What arrangements were made for you — 10

Mr. Lloyd: Strike that out.

Q. Did you know how to drive an automobile of that sort before that?

A. I did not.

Q. How were you going to drive this Ford? It was a new Ford, wasn't it?

A. It was a new truck, yes.

Q. How were you going to learn to drive it? 20

A. Through arrangements made to teach me to drive.

Q. The Burk Motor Company were to teach you to drive?

A. Exactly.

Q. And Mr. Diebold was the man this day that was designated to teach you?

A. Yes.

Q. Tell us who drove the automobile out of the Burk Motor Company's place of business? 30

A. On that day?

Q. That day?

A. John Diebold.

Q. How far did he drive?

A. From there down to about Albany Avenue.

Q. Is that out of traffic?

A. Yes.

Q. Then you took it over? .

A. I took it.

Q. Did you practice turns and backing and going forward, etc.?

A. On Winchester Avenue and Ventnor where he informed me they gave the test for drivers' licenses.

Q. Then you came back to the garage?

10 A. Yes.

Mr. Bishop: May I have permission to ask a few more questions on cross-examination?

Mr. Lloyd: Sure.

Further cross-examination.

20 By Mr. Bishop:

Q. You subsequently drove a Ford and became familiar with the operation of the Ford automobile?

A. Yes, I did.

Q. That is the old T model, so-called?

A. Yes.

Q. Where is the brake on that model?

A. On the right.

Q. What do you mean?

30 A. Well, the foot brake.

Q. The foot brake is what?

A. On the right.

Q. There is a pedal? On the right of what?

A. On the right of the foot control.

Q. Which side is it with relation to the automobile, right or left side of the automobile?

A. The right side, but it is on the left side—it is on the right of the left side.

Q. There are three pedals, aren't there?

A. What is that?

Q. There are three pedals, aren't there?

A. Yes.

Q. Three foot pedals. All of those pedals are on the left side of the automobile, aren't they?

A. Yes.

Q. And what you mean by the right side is that the foot brake is the one nearest the right; is that it?

A. Yes.

Q. Where is the emergency brake?

A. On the left.

Q. All the way on the left?

A. No.

Q. What?

A. No.

Q. Where is it, then?

20

A. That I couldn't tell you exactly. I haven't been in one for a year.

Q. Can you tell me how far from the left side of the car it is?

A. About eighteen inches.

Q. About eighteen inches from the left-hand side of the car?

A. Yes.

Q. You mean eighteen inches inside of the car?

30

A. Yes.

Q. The emergency brake?

A. If it is the same thing I am thinking about.

Q. Do you have a brake on the Ford which is controlled by a hand lever?

A. Yes.

Q. That is what I mean when I say emergency brake. Is that when you mean?

A. That is what I mean.

Q. You mean that that lever is eighteen inches to the right —

A. No; not that one.

Q. Where is that lever?

A. On the left.

10 Q. That is on the extreme left-hand side of the inside of the car, isn't it?

A. I don't know whether you would call it the extreme left-hand side.

Q. Is it to the left of all the pedals?

A. Almost in line with the —

20 Mr. Lloyd: I am wondering if we can't agree. I think many of the members of the jury and I imagine Mr. Baratta and Mr. Bishop, and I certainly know where an emergency brake on a Ford is.

Mr. Bishop: If you agree it is on the left-hand side of the automobile, that is all I want to prove. We agree the emergency brake is at the driver's left.

Q. The emergency brake is to the driver's left?

A. The driver's left hand.

Q. And anybody that sits on the front seat beside you is to your right?

30 A. Yes.

Q. To the right of the driver?

A. Yes.

Q. So that in order for some one else sitting on the front seat to reach the emergency brake, they would have to reach across the driver to the extreme left-hand side of the car to reach it; is that right?

A. Yes.

Q. The driver's feet are in position over the pedals, is that right?

A. Yes.

Q. So that in order for anyone sitting alongside of the driver to get at those pedals they would first have to get the driver's feet off them; is that right?

Mr. Lloyd: Well, I guess we are coming to conclusions again.

10

Mr. Bishop: All right; I won't press it. That is all.

Re-cross examination.

By Mr. Lloyd:

Q. Now, we have this all straight; that the first of the pedals—there is no gear shift lever in the middle, is there? 20

A. No.

Q. Between the two people sitting in this car?

A. No.

Q. The first thing is the brake; then the reverse pedal and then the clutch, is that right?

A. Which side are you going from?

Q. I am going from right to left. You use your right foot for the brake?

A. Yes.

30

Q. And your right foot for the reverse gear?

A. Yes.

Q. And your left foot for low gear and high gear and neutral?

A. Yes.

Q. And your left hand for the emergency brake that releases the clutch?

A. Yes.

Q. Keeps it in neutral?

A. Yes.

Re-direct examination.

By Mr. Baratta:

10 Q. You are still working for Mr. Livezey?

A. Yes.

Q. Your employment has never been interrupted since 1910, has it? You kept right on working?

A. Kept right on.

Q. And you have used that same car that you were learning to drive in, in and about Mr. Livezey's business since the accident?

A. Yes.

20 Mr. Baratta: All right; that is all.

(Witness excused.)

FRANK LAROSA, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

30 Direct examination.

By Mr. Baratta:

Q. Are you the father of the—do you want an interpreter?

A. I think so. Talk slow.

Q. You are the father of Miss Frances LaRosa?

A. Yes, sir.

Q. You live in Pleasantville?

A. 130 East Bayview Avenue, Pleasantville.

Q. 130 East Bayview Avenue, Pleasantville?

A. Yes.

(Further examination through the official interpreter.)

10

Q. What is your name?

A. Frank LaRosa.

Q. You are one of the plaintiffs in this suit?

A. Yes, sir.

Q. Are you the father of Frances LaRosa?

A. Yes, sir.

Q. When did your daughter come of age?

A. On the 26th day of August, 1928.

Q. 26th day of August, 1928. Did your daughter always live with you from the time of her birth until she has come of age?

A. Yes, sir; always.

Q. At the time of the accident—you recollect the accident, Mr. LaRosa?

A. Yes, sir; the 31st day of August.

Q. What year?

A. 1926.

Q. August 31, 1926. Your daughter at that time was working, was she?

A. Yes, sir.

30

Q. Where was she working?

A. She was a waitress somewheres. I don't know what they call the restaurant.

Q. Would you know the name of the place if you heard it?

A. Yes, I would remember if I heard the name of the place.

Q. Is it the Central Lunch?

A. Yes, sir.

Q. How much money did your daughter bring home to you, if any, from her labors?

A. She used to bring home \$10 a week, her wages. Then she used to receive two dollars.

Mr. Lloyd: I object—well, never mind.

10 Q. Go ahead.

A. \$10 a week, and every night she brought home tips which amounted to two or three to four dollars and a dollars and a half. She was making approximately about twenty-five dollars a week.

Q. Now, at the date of the accident, Mr. LaRosa, were you at home when your daughter was brought in or come home?

A. I came home about a half hour later.

20 Q. And what condition was your daughter in at that time when you came home?

A. She couldn't walk and I found her lying on a couch.

Q. And was a doctor procured for your daughter or summoned?

A. Not right away because she said she was not hurt seriously —

Mr. Lloyd: I object.

30 Q. When was the doctor called?

A. After two days.

Q. For what reason?

A. Because she couldn't help herself any more.

Q. And how long did the doctor treat her?

A. For two weeks.

Q. When was the doctor called?

A. After two days.

Q. For what reason?

A. Because she couldn't help herself any more.

Q. And how long did the doctor treat her?

A. For two weeks, and after, when we needed him, we called him in.

Q. And was the daughter in bed and out of bed or about the house, and for what period of time after the accident?

A. For two weeks she was in bed, and after she started to come down, then I used to take her on my back and take her upstairs again.

Q. How long was she in that condition?

A. For five weeks.

Q. And then?

A. Then after that any time she wanted to rest herself and come down, she used to use the cane; but she used to have the help of a cane or her mother or someone else.

Q. And for how long did that continue? 20

A. About two months after that, more.

Q. Two months after the five or six weeks' incapacity, or all together?

A. About three months or three months and a half after the five weeks.

Q. After the five weeks. Now, did your daughter work during this period that you have just described?

A. I do not remember.

Q. What is your best recollection? 30

A. She did not work during that time.

Q. Now, please tell me the first—at or about what time after the accident did your daughter go to work?

Mr. Bishop: I object to that. Two questions

back he was asked and he said he didn't remember. Now, he is asked to testify to a date to his best recollection.

Q. Did she or did she not work? Please state definitely did your daughter work or not work during this period of incapacity just described?

A. She never worked.

10 Q. All right. When was the first time that your daughter was able to go to work as you recollect it?

A. Precisely I can say it was either the middle part of March or beginning of April.

Q. Latter part of March or beginning of April following August, of the accident?

A. In 1927.

Q. And where did your daughter go to work then?

20 A. To the factory of stockings, or socks, at New Road.

Q. How much did she bring you home from there?

A. The biggest week was between eighteen and twenty dollars.

Q. How much time did the daughter lose, if any, from her work?

A. Every month she lost two or three days.

Q. What was the reason?

A. Because she was sick.

Q. From what?

30 A. Of some blood.

Q. Blood?

A. Yes, during the period of her monthlies.

Q. Now, what symptoms did your daughter manifest of any ailment, if any?

A. At times she looked like she was dying, and the morning she used to get up with swollen eyes

and the throat was swollen, headaches, and she still has—she is troubled with her voice now.

Q. What sort of trouble in her voice?

A. Always changing. Now, she talks in one manner, and then there is a change, something different.

Q. Did your daughter ever help you with the housework?

A. She was willing to do it but she never was able to do it. 10

Q. I mean before the accident?

A. Yes, sir.

Q. Now, since the accident, has she been just as able to help you in your housework as before the accident?

A. No, sir.

Q. Why not?

A. Because her leg hurts.

Q. Any other reason?

A. Her leg where she was struck, where she received this blow, hurts so she can't do it. 20

Q. After the Star Knitting Mills, or wherever it was, that she went to work after the accident, where did she go to work?

A. In Philadelphia.

Q. Where?

A. Where they make pocketbooks. I don't know what you call it.

Q. How much did she bring home a week, from her work there? 30

A. When she began, \$15. Then after that they raised her to \$18.

Q. Did she miss any work there?

A. Yes, always.

Q. How much?

A. Two or three days every month.

Q. Where was this? What city? Atlantic City or —

A. In Philadelphia.

Q. At the time of these ailments, what symptoms does your daughter manifest?

A. Her face is white. She is just like a corpse. Her fingernails get black. Her lips seem to change color. Every month she has her period she goes for five or six days continuously discharging blood.

10 Q. Is there any sign of suffering, outward sign?

A. Very much.

Q. Now, after the employment at the Belford Trunk factory—or whatever it was, I don't care, call it by any name you like—where did you live?

A. We came back to Pleasantville again.

Q. Back to Pleasantville. Now, when you got back to Pleasantville—when you go back to Pleasantville, was your daughter all right then?

A. No, she fell again sick.

20 Q. How long was she sick then?

A. About four to five months.

Q. Sick?

A. Yes, sir.

Q. Did you have medical attention for her during this last sickness?

A. Yes, sir. We called the doctor. In the middle of March she was ready to die or near dying. We called Dr. Madden of Pleasantville. Dr. Butcher—he stated that there was too much —

30

Mr. Lloyd: I object.

Q. She was about to die and you called a doctor. Now, did she go to work after that?

A. Yes, sir.

Q. And how much did she bring you a week then?

A. She began from sixteen up to twenty-one dollars.

Q. Did she lose any time at this last place of employment?

A. Always.

Q. Always what?

A. Lost time.

Q. How much time?

A. The same thing, two or three days.

Q. Any evidences of suffering during these 10 periods?

A. In some weeks she only lost two days.

Q. Any evidences of suffering during these periods of loss of time?

A. Yes.

Q. What was the nature of the suffering?

A. She used to have pains all over her stomach and pains in the head.

Q. Anything else?

A. She couldn't stand up. She always laid down 20 on the couch.

Q. Why couldn't she stand up?

A. Because of the great pain she had in her stomach.

Q. Now, is she working at the present time?

A. No, sir.

Q. You procured medical attention for your daughter from the date of the accident until she came of age, August 26th, 1928; didn't you?

A. Yes, sir.

30

Q. I want to confine the inquiry to the dates of the period of time between the date of the accident and the date of majority, August 31, 1926, to August 26, 1928.

A. Yes, sir.

Q. And did you procure any ointments or liniments during that period for your daughter?

A. I bought everything, oils and ointments; anything she needed.

Q. And about how much money did you spend in that effort to alleviate your daughter's pain and suffering?

Mr. Lloyd: Objected to as immaterial and not the proper method of proof.

10 The Court: How much money this witness spent?

Mr. Lloyd: Yes, sir.

The Court: I will permit it.

Mr. Lloyd: May I have an exception?

The Court: Yes.

20 Q. (Repeated by the stenographer.) "And about how much money did you spend in an effort to alleviate your daughter's pain and suffering?"

A. Between three and four hundred dollars.

Q. Between three and four hundred dollars. That is about a hundred dollars a year; is that right?

A. Yes, about that; sometimes more.

Q. Did your daughter ever have any fainting spells or any other —

A. When? Before or now?

30 Q. Since the accident?

A. Yes, twice.

Q. You know of twice?

A. Twice.

Q. Do you know the last time?

A. I don't remember. It was about two months ago; about two months ago.

Mr. Baratta: That is all.

Cross-examination.

By Mr. Lloyd:

Q. The Central Lunch where she worked first closed shortly after this accident, didn't it? The man ran away?

Mr. Baratta: I object to that question.

10

The Court: Objection sustained.

Mr. Lloyd: Well, suppose we just strike out "the man ran away."

The Court: All right.

Q. (Repeated by the stenographer.) "The Central Lunch where she worked first closed shortly after this accident, didn't it?" 20

A. Yes.

Q. And she went to work for the Star Knitting Mills on the 16th day of September, 1926, didn't she?

A. No, sir.

Q. How many daughters have you?

A. Four daughters, and two worked at that time. I have four girls, and at that time two of the girls were working and two were not working.

Q. Who were the ones that were working? 30

A. Nellie—Nettie.

Q. Nettie and Frances worked?

A. And in the month of March or beginning of April she went to work. She was called to go to work, but she couldn't go to work.

Q. Nettie worked; is that right?

A. Yes, sir.

Q. And Frances worked at the time of the accident, before the accident?

A. Yes, sir.

Q. And Frances never worked before the accident?

A. She was working in the restaurant prior to the accident, but never in this place that is in question where they used to make these socks.

Q. The Star Knitting Mills didn't open up until 10 September; did it?

A. I don't know anything about it; only the boss used to send the notice to the house.

Q. Well, Nettie worked at the Star Knitting Mills at the same time that Frances did?

A. She was called to go to work, but being she was sick, she couldn't go.

Q. And called the same time that Nettie was?

A. Yes, sir.

20 Mr. Lloyd: That is all.

Mr. Bishop: No cross-examination.

Re-direct examination.

By Mr. Baratta:

Q. How many daughters have you?

A. Four.

30 Q. (To the interpreter). Did I understand her to say something about Fortunata, another daughter?

The Interpreter: Yes.

Q. Did she work, too?

A. Fortunata is her name, but in English they

have taken the name Nettie, and that is the girl we have been talking about. That is Fortunata ——"Fortune." That is the one that worked.

Q. Any other daughter ever work at this mill?

A. No, sir.

Q. How about the married daughter that is here today?

A. No, sir.

Mr. Baratta: All right.

10

(Witness excused.)

Mr. Baratta: Plaintiff rests.

Mr. Lloyd: Before that, may we have Frances back on the stand?

The Court: They were not finished on cross-examination. Recall Frances.

20

FRANCES LAROSA, recalled.

Further cross-examination.

By Mr. Lloyd:

30

Q. Frances, that is your writing, isn't it, there?

A. That is my writing, yes.

Mr. Lloyd: Mark it for identification.

(Markel D1 for identification.)

Mr. Baratta: She didn't even see it. She says, "That is my writing, I guess."

Q. (The paper, D1 for identification is shown to the witness).

A. No, it is not mine.

Q. That is not yours. You are certain of that, "Frances LaRosa" is not your writing?

A. I am certain it is not my writing.

10 Q. Your sister works at the Star Knitting Mills?

A. Yes.

Q. Under the name of Nettie?

A. Yes.

Q. And you worked there under the name of Frances?

A. Yes.

Q. You both went to work there on September 16th, didn't you?

A. No.

20 Q. 1926?

A. No.

Q. And you both worked on Monday and Wednesday of that week?

Mr. Baratta: She said no, Mr. Lloyd.

The Court: Mr. Baratta, please do not interrupt. You will have an opportunity.

30 A. I didn't go to work at the same time because I remember that my sister—we were called to go but I was not able to go and she went before I did.

Q. On the week of September 29th, you and your sister each worked; didn't you?

A. No.

Q. And you never worked at the Star Knitting Mill, then, until March or April of 1928?

A. I don't just remember just when I went; but I know it was not then; in September.

Q. Well, now, September and March or April is quite a time. When did you go?

A. Well, I don't quite remember that.

Q. You don't remember when you did go to work;

A. Not there; but I know I didn't go in September.

Cross-examination.

10

By Mr. Bishop:

Q. Didn't you testify this morning that you didn't go to work at the store or mill until March or April?

A. No, I didn't say that.

Q. You didn't?

A. No.

Q. Do you remember the day of this accident?

20

A. Yes.

Q. Where did you go immediately after the accident occurred?

A. Home.

Q. Did you go anywhere first?

A. No.

Q. Did you go in the Burk Motor Company?

A. Yes.

Q. Who were there?

A. There was a lot of men around there.

Q. Do you know the names of any of them?

30

A. I had a lady friend with me at the time and then I don't know the other people that were there.

Q. Would you recognize any of them if you saw them again?

A. I don't think I could, because I was in such a daze that I couldn't notice anybody.

- Q. Were you asked if you were hurt?
A. Yes.
Q. What did you tell them?
A. I said I didn't think it was anything.
Q. Did they want to take you to the hospital?
A. Yes.
Q. Did you agree to go?
A. I didn't want to go.
Q. Did you refuse to go?
10 A. Yes.
Q. You were conscious?
A. I was in a daze.
Q. You were conscious?
A. Yes.
Q. Did you sign any papers while you were there?
A. They told me I had to sign a paper or go to the hospital, and they would not let me out unless I did sign the paper or go to the hospital.
Q. Who told you that?
20 A. One of the men around there.
Q. Was it the police officer?
A. No, I don't think so.
Q. There was an officer there?
A. Yes.
Q. Did the officer want to take you to the hospital?
A. The officer didn't say anything to me; not that I remember of.
Q. Is that your signature (paper shown to and examined by the witness)?
30 A. Well, maybe it is. I don't know.

Mr. Bishop: I ask that it be marked for identification.

(The paper referred to is marked for identification "D1, Bishop.")

Q. Will you write your signature?

Mr. Baratta: I admit that that is her signature.
You don't have to write it.

Q. I want you to write it.

A. (Witness writes.)

Mr. Bishop: I offer that in evidence.

10

(The paper offered is marked for identification
"D2 Bishop.")

Mr. Bishop: Do you now admit this is her signature?

Mr. Baratta: Yes; I am satisfied it is her signature. She tells you she was in a daze when she signed it.

20

(The paper referred to, heretofore marked D2 for identification, is received in evidence.)

Mr. Baratta: What is your purpose?

Mr. Bishop: I offered it.

Mr. Baratta: I object to the offer.

30

The Court: For what reason?

Mr. Baratta: I object to the offer until I know for what purpose it is being offered, and have it connected up properly. A man can't just offer a piece of paper.

Mr. Bishop: The instrument is here. I will let the Judge look at it.

The Court: What is the purpose of the offer, Mr. Bishop?

Mr. Bishop: The purpose is to show the contents of the statement over her signature and that she was not hurt at the time of the accident.

10

Mr. Baratta: If I may have that for a moment and cross-examine, perhaps I will admit it without further argument.

Mr. Bishop: You can't cross-examine on a paper which is not in evidence.

Mr. Baratta: I am certainly entitled to examine as to how this thing was executed. What do you say,

20 Mr. Bishop?

Mr. Bishop: No, I don't consent to your cross-examining on a paper that is not in evidence.

Mr. Baratta: Well, then, I will admit it.

(The paper was heretofore marked in evidence as appears above.)

30 By Mr. Baratta:

Q. You recollect immediately after the accident?

A. Yes, sir.

Q. Who was with you at the time of the accident?

A. My lady friend.

Q. How much older than you was your lady friend?

- A. She was quite older than me.
- Q. How much older?
- A. She is about forty-three years old, and I was nineteen at the time.
- Q. After the accident happened, what did they do to you?
- A. They took me into Burk's Motor Company.
- Q. Who did?
- A. I didn't see them; but men—I know men took me in there, but I didn't know who they were. 10
- Q. Was your lady friend there with you?
- A. She came in but then I don't know where she was at.
- Q. Was she there before you signed the paper and after you signed the paper?
- A. She was there before. She wasn't there at the time I signed the paper.
- Q. At the time that you signed the paper and when you signed the paper, did she read it to you?
- A. No. 20
- Q. Did anybody read it to you?
- A. No.
- Q. Did anybody tell you what was in it?
- A. No.
- Q. What did they say to you when they said, "Put your name to that paper?"
- A. "You have got to sign or we won't let you go."
- Q. Wouldn't let you go where?
- A. Home.
- Q. And you had nobody to counsel or tell you what to do? 30
- A. No.

By Mr. Bishop:

Q. You can read English; can you?

Mr. Baratta: Did you read it?

The Witness: No, I didn't.

Mr. Bishop: I want my question answered.

Q. You can read English?

A. Yes.

10 By Mr. Baratta:

Q. What was your condition at the time you signed that statment?

A. I was in a daze. I didn't know what was in the paper.

Mr. Bishop: I object and ask it be stricken.

The Court: I refuse.

20

Mr. Bishop: Allow me an exception.

The Court: Exception allowed.

Q. And after you signed it, they let you go?

A. Yes.

Q. But they wouldn't let you go before you signed?

A. No.

30

Mr. Baratta: That is all.

(Witness excused.)

PLAINTIFF RESTS.

(In Chambers.)

Mr. Bishop: I move for a non-suit in behalf of the Burk Motor Company on the ground, first, that they have failed to sustain the allegations of their complaint. The only counts in the complaint that relate to any liability on the part of the Burk Motor Company are counts 5, 6, 7, 8, 9 and 10. In 5 it is alleged that the automobile was being driven on the business of the Burk Motor Company. That has not been proven. 10

The sixth seems to be the same thing, as far as I can gather; that it was operated by Diebold on our business.

The seventh is that we operated by Kohl, as agent, on our business.

The eighth also alleges that Kohl was a servant of the Burk Motor Company and was operating it on the business of the Burk Motor Company; and the ninth is that Diebold was agent of the Burk Motor Company, operating it on our business. 20

The tenth is an allegation for the father.

Now in making this motion I conceive that it is necessary first, in order to hold my client responsible to prove that this automobile was being operated on some business of theirs. I am familiar with the general rule where ownership of an automobile is proven and the presumption being that it was operated on the business of the owner and the driver is the agent of the owner acting within the scope of his authority; but, of course, the ownership proven is that of Livezey and not the Burk Motor Company. Where the presumption of ownership might favor them as to Livezey, it is against them as to me. 30

In addition to that, it seems to me that this case

comes as close as any case can (I might say that I have made an examination for cases of this character in our State and am unable to find any) to a similar question raised in the case of Jenky versus Ford Motor Company, a Michigan case.

10 So in my estimation there are two factors that are important in determining Burk's liability: First, that the ownership of the car was not in them but was in Livezey; and, second, their general employe, if we can use that term as to Diebold, became, for the purpose that he was being used for on that day, the agent or servant temporarily, and for that limited purpose of Livezey whom he was serving, and became relieved of his service to his own employer whose service he was not actually in at that time.

20 The Court: I think it is purely a question of fact for the jury to determine as to the liability of Burk. I presume it is a disputed question of fact as to the ownership of the automobile and as to the action of their agents and servants. For that reason I will deny your motion.

Mr. Bishop: I want to urge as a further ground that no negligence on the part of Diebold has been shown even though it be assumed that he was our agent at the time.

30 The Court: And that is denied. The jury will pass upon it as a question of fact.

Mr. Bishop: May we consider that these same motions are made for direction?

The Court: Yes.

Mr. Bishop: And denied for the same reason?

The Court: Yes.

Mr. Bishop: Exception allowed to both motions.

DEFENDANT'S (LIVESEY) CASE.

EMMA WILLIAMS, called as a witness on behalf of 10
the defendant, Livezey, being sworn, was examined
and testified as follows:

Direct examination.

By Mr. Lloyd:

Q. Did you in 1926 know Frances LaRosa?

A. Yes.

Q. In September of that year did you know her? 20

A. In September, yes.

Q. Do you also know Nettie, her sister?

A. Yes.

Q. And at that time where were you employed?

A. Star Knitting Mills.

Q. Is that when the mills opened up?

A. Around in September; around the 10th or 11th,
something like that.

Q. At that time, did Frances and Nettie both come
to work there?

A. Nettie came first. 30

Q. And how long after that was it before Frances
came?

A. I cannot say for sure, but it was not any more
than ten days or two weeks after.

Q. After Nettie came?

A. After we started, yes.

Q. Then did you work with them at that time?

A. Yes, sir.

Q. And you worked with them how long?

A. Oh, I don't know. You see I can't just recall when they left. Nettie left and I have been there ever since.

Q. Well, they worked there for some time together, did they?

A. Yes. Nettie worked there the longest.

10 Q. During the fall and winter of 1926 and 1927, did Frances work there with her?

A. I don't know.

Q. What did you say?

A. I can't remember when it was she left.

Q. Well —

A. The books will tell that.

Q. Did you keep any books?

A. Not at that time, no. I was working at the same thing she was, on a machine.

20 Q. But you weren't forelady then?

A. No; not then.

Q. And you think she came to work shortly after the mill opened?

A. Yes, she did.

Q. Frances did?

A. Yes.

Q. And she worked there for some time, did she?

A. Well, quite some time. I wouldn't say just how long. I don't just remember.

30 Q. Was it a matter of months?

A. Yes.

Mr. Lloyd: Cross-examine.

Cross-examination.

By Mr. Baratta:

Q. How do you remember this so well?

A. Well, I know Frances and Nettie long before I went to the Star Knitting Mill, and I was talking to Nettie, and she told me Frances was coming in to work.

Q. We can't have that here. You said a moment 10
ago that you weren't sure whether she worked there
in the fall and winter of 1926 and '27 in answer to
Mr. Lloyd's question?

A. No.

Q. You are not sure?

A. I don't know when she left.

Q. And you don't know whether she worked there
at that time or not, do you?

A. No, I cannot say.

20

Mr. Barratta: Well, that is all I want.

Re-direct examination.

By Mr. Lloyd:

Q. Do you know whether or not she ever worked
there?

A. Sure she worked right—well, a couple of ma- 30
chines from me.

Q. When was that after the mill opened?

A. Well, if I remember right, it was no more
than two weeks, maybe not that long.

Q. And she worked there steadily for some time
after that, did she?

A. I remember because I knew her, you know. She

would be out a day or couple of days, and she would come right back again. That's all I know.

Q. And that was for a matter of months?

A. I think so.

Mr. Lloyd: That is all.

Re-cross-examination.

10

By Mr. Baratta:

Q. You just think so?

A. I know she was there.

Q. All right. I don't want to know any more—do you know another Frances LaRosa?

A. No.

Q. Do you know if there is such a being in the world?

20

A. I only knew her.

Q. You don't know the other LaRosa, and you don't know that there is another Frances LaRosa?

A. I don't know.

By Mr. Bishop:

Q. Is this the Frances LaRosa you know?

A. Yes, her and her sister.

30

By Mr. Baratta:

Q. That is the only one you know?

A. Yes.

(Witness excused.)

EMILY SANBERGER, called as a witness on behalf of the witness Livezey, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Lloyd:

Q. Is it Miss or Mrs.? 10

A. Miss.

Q. Miss Sanberger, are you connected with the Star Knitting Mills?

A. I am.

Q. In what capacity?

A. I am now treasurer.

Q. Were you there in 1926?

A. I was.

Q. In what capacity at that time?

A. I was then bookkeeper. 20

Q. Did you at that time know Frances LaRosa, the plaintiff here?

A. I did.

Q. Did you know her sister?

A. I did.

Q. Can you tell us the first day that she came to work for the Star Knitting Mills from any records that you have?

A. From the records that I have she came approximately the—16th. 30

Mr. Baratta: Have you the records here?

The Witness: Yes.

Mr. Baratta: All right, go ahead.

Q. 16th of what?

A. September, 1926.

Q. 16th of September, 1926?

A. September, 1926.

Q. And she worked how long for the Star Knitting Mills?

A. She worked up until about the middle of June, 1927.

Q. And then she left?

10 A. Yes.

Mr. Lloyd: Cross-examine.

Mr. Bishop: No questions.

Cross-examination.

By Mr. Baratta:

20 Q. She left in when, September?

A. What did you say?

Q. She left in September, 1927?

A. No; she left in about June.

Q. Would you know if somebody else was being carried on your books as Frances LaRosa?

A. I don't understand you.

Q. If some one else was being carried on your books under the name of Frances LaRosa, would you know it?

30 A. I would.

Q. How would you know it?

A. Because I am there. I am there when the pays are made out and when they are given out.

Q. And you have signatures for those pays?

A. Yes.

Q. Have you got signatures here?

- A. No. We destroy our time cards after ———
- Q. I ask you have you got the signatures here?
- A. No, I have not.
- Q. That is the answer. What records have you here, then?
- A. My pay roll book.
- Q. That is all?
- A. No. I also have the record of the forelady from whose records I make my pay roll.
- Q. And without that, is there any way you can tell us that she was there ——— 10
- A. And from knowing Frances LaRosa.
- Q. Do you recollect that she was there?
- A. I do.
- Q. Of your personal ———
- A. Yes.
- Q. Did you know that she had an accident at that time?
- A. Only from what I had heard from the employes at the mill.
- Q. Was she walking around without a cane or with a cane? 20
- A. Without a cane, as far as I could see.
- Q. Without a cane. What kind of work did she have to do there?
- A. She was working on a looper; a looping machine.
- Q. Does that require the use of her limbs?
- A. Only so far as her toes on the pedal.
- Q. And does it require the use of her arms? 30
- A. Yes.
- Q. Must she move her body at all?
- A. Well, not to any great extent.
- Q. Not to any great extent. Were you here this morning when Dr. Madden testified?
- A. No, I was not.
- Q. If Dr. Madden testified this girl couldn't have

worked within five weeks after the accident, and the accident occurred August 31, 1926, would you still say that she worked?

A. I would.

Mr. Lloyd: I object. There is no such testimony. Besides, one witness certainly cannot comment on the testimony of another.

10 The Court: Objection sustained.

Q. How is it that you remember this period so vividly?

A. What do you mean?

Q. How is it that you remember this period in question so vividly? You seem to testify without hesitancy.

A. Why, I have records.

20 Q. You have records and you are perfectly positive that those records couldn't go amiss?

A. I am positive.

Q. What makes you so positive? Do you ever make any mistakes?

A. We all make mistakes.

Q. That is why they have erasers on lead pencils for that, don't they?

A. I refuse to answer that.

Q. How old are you?

30 Mr. Lloyd: I don't think that is material. It may be embarrassing.

The Witness: Not at all.

A. Forty-one.

Q. Whom have you talked this thing over with before you came up to testify?

A. With Mr. Starr.

Q. And anybody else?

A. Those who examined me.

Q. Who?

Mr. Lloyd: I object to that.

Q. How long did you talk with them?

A. Well, I don't know how long I talked* with them. 10

Q. Did you go over this whole thing with them?

A. No more so than just to look over my records.

Q. Nothing else?

A. I don't know what you mean.

Mr. Lloyd: Maybe I can help counsel. Do you want to put me on the stand?

Q. When was the first time you talked to Mr. Lloyd about this? 20

A. About half an hour ago.

Q. Never saw him before?

A. Not until I came into this court room.

Q. Did you ever see anybody else about this that asked you any questions with reference to this period?

A. This morning.

Q. Before this morning?

A. About a year ago.

Q. About a year ago. Were you in court yesterday afternoon? 30

A. I was not.

Mr. Lloyd: I try to prepare a case right.

Q. When was the last time you talked about this?

Mr. Lloyd: Oh, I think, if your Honor please, we have gone into this and gone into it. It is not material at all. I would not think of putting a witness on the stand whose testimony I didn't know what it was going to be.

Mr. Baratta: All right. Call your next; call your next.

- 10 Q. We haven't those pay slips here, have we?
A. No.
Q. We have everything else here, haven't we?
A. Yes.

(Witness excused.)

- 20 LAWRENCE H. STARR, called as a witness on behalf of the defendant Livezey, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Lloyd:

Q. Mr. Starr, you are vice-president of the Star Knitting Mills?

- 30 A. Yes, sir.

Q. Are you acquainted with Frances LaRosa, the plaintiff here?

A. I am.

Q. Did you know her in September, 1926?

A. I did.

Q. Was she employed by you at that time?

A. She was.

Q. And about how long did she work at your place?

A. She worked with us until approximately June 15, 1927.

Q. And she has not worked there since?

A. No, sir.

Mr. Lloyd: Cross-examine.

Cross-examination.

10

By Mr. Baratta:

Q. Didn't she work after June 15, 1926?

A. 1927. We opened in Pleasantville in June, 1926.

Q. Did she work in June, 1927?

A. That is the last I recall, but I am sure she worked until that day.

Q. What makes you so sure that she worked all the time up to that date? 20

A. Because I am personally in charge of production and in the mill all day long.

Q. And you look at the employees?

A. I know every employe in my employ.

Q. And you recollect this period very distinctly?

A. Absolutely.

Q. There isn't anything in your mind, no question at all?

A. I know most of my employes by the first name. 30

Q. What makes you so positive that during that period she was employed? Now, it is a long time ago.

A. I am just as positive of it as I am in this box.

Q. That is how positive you are?

A. Absolutely.

Q. That is too positive for me. That is all I want to ask you.

(Witness excused.)

EDWARD P. KOHL, recalled.

10 Mr. Lloyd: One or two questions of this witness, if your Honor please.

By Mr. Lloyd:

Q. Mr. Kohl, did you ever see this? Do you know anything about it?

A. I do not.

Q. You aren't a party to this at all?

A. No.

20 Q. And knew nothing about it?

A. No.

Mr. Lloyd: That is all.

Cross-examine.

Mr. Bishop: I don't care to cross-examine.

Cross-examination.

30

By Mr. Baratta:

Q. When you bought that car, was that a condition of the purchase that you be taught to ——

Mr. Bishop: I object. This is in the nature of opening Mr. Baratta's case that has been closed.

Mr. Baratta: There is no objection to that; is there?

Mr. Bishop: There certainly is on my part.

The Court: Counsel objects.

Mr. Baratta: Well, it is discretionary with the Court.

10

The Court: Well, if the witness knows.

Q. Do you know whether it was a condition of the sale?

A. I don't know.

Mr. Bishop: I withdraw my objection.

Mr. Baratta: All right.

20

(Witness excused.)

JOHN R. LIVESSEY, called as a witness in his own behalf, being sworn, was examined and testified as follows:

30

Direct examination.

By Mr. Lloyd:

Q. You are one of the defendants in this suit?

A. Yes, sir.

Q. You don't know anything about the accident, do you?

A. No, sir.

Mr. Lloyd: That is all.

Cross-examination.

10 By Mr. Baratta:

Q. Mr. Livesey, that was your automobile in the accident?

A. Indeed it was.

Q. You bought that automobile?

A. Yes, sir.

Q. From the Burk Motor Company?

A. Yes.

Q. Under what arrangements?

20 A. What is usually made for an automobile.

Mr. Lloyd: Oh, I object to this as not proper cross-examination.

The Court: Objection sustained.

Re-direct examination.

30 By Mr. Lloyd:

Q. This car was delivered to Mr. Kohl after he had learned to drive it?

A. Yes.

Q. Nobody else was to drive it?

A. No.

Re-cross examination.

By Mr. Baratta:

Q. You don't deny that Mr. Kohl was in your employ at the date of the accident?

A. The man has been with me long enough, to know that he was a pretty good man.

10

(Witness excused.)

DEFENDANT LIVESEY RESTS.

DEFENDANT BURK MOTOR COMPANY'S
CASE.

JOHN P. REILLY, being sworn, was examined and testified as follows: 20

Direct examination.

By Mr. Bishop:

Q. You are employed by whom?

A. At the present time?

Q. Yes.

A. Why, I am not employed—I am employed by a man named Campbell.

Q. Were you employed at the time of this accident we have talked about today by the Burk Motor Company?

A. I was; yes, sir.

Q. In what capacity?

A. I was a manager so far as the inside of the building was concerned, exclusive of sales.

Q. Did you see the accident?

A. No.

Q. Know nothing about the actual happening of it?

A. No.

Q. Did you see Miss LaRosa after the accident.

A. I did.

10 Q. Where?

A. In the show room of the building.

Q. Were you present when this statement was obtained?

A. I was.

Q. Will you tell the Court and jury the circumstances connected with the obtaining of that statement in Miss LaRosa's presence in your building immediately after the accident?

20 A. At the time this accident occurred, I was up in the building and of course they called me. I went downstairs and this young lady with another lady was in the show room. Of course I said to Miss LaRosa, "We will send you to the hospital." Well, of course she refused to do that. Of course, I continued to prevail upon her going to the hospital because I didn't know how serious it was, whether it was serious or not, and under the circumstances I thought the best thing for her to go up there even if it was only to the dispensary. Of course she —

30 Q. Was there a police officer there at the time.

A. There was a police officer. The officer on the beat, as I recall. His name was Smith.

Q. Was it in compliance with a suggestion of his that this statement was written out and obtained?

A. Yes. He suggested that this statement be written and obtained.

Q. Were there any threats or coercions used by anyone there to keep Miss LaRosa there?

A. Positively not.

Q. Or make her sign this statement or go to the hospital?

A. Not at all.

Q. You were trying to help her?

A. That is all.

Mr. Bishop: Cross-examine.

10

Cross-examination.

By Mr. Baratta:

Q. Did you read the statement to her?

A. She read it herself.

Q. Did you read it to her?

A. I did not.

Q. Was she in a nervous state or a composed state? 20

A. Well, under the circumstances naturally —

Q. I want to know—a nervous state or a composed state?

A. Well, nervous to some degree.

Q. Nervous state?

A. To some degree.

Q. Was the lady who was accompanying Miss La-Rosa present at the time that she signed the statement? 30

A. Positively.

Q. There is no question about that?

A. Absolutely.

Q. Would you know the lady if you saw her?

A. Yes; I am pretty sure I would.

Q. Is she here now?

A. I believe that is the lady sitting in the back of the court room on the right-hand side.

Q. That is right. You didn't read the statement to her and you got her to sign that statement?

A. She signed the statement, yes.

Q. Do you think it was a proper thing for you to do to get that statement signed?

A. Absolutely.

10 Q. You were willing to have a girl sign, fresh out of an accident, a statement like that, and say it is a manly thing to do?

A. That was the only thing I thought to do at the time.

Q. That was the manly thing for you to do?

A. That was what I thought proper.

Q. That was what you thought?

A. Yes.

20 Mr. Baratta: Well, that is all we want to know.

Mr. Bishop: No questions.

Cross-examination.

By Mr. Lloyd:

Q. Who was Mr. John P. Diebold?

30 Mr. Bishop: I object to that as not proper cross-examination.

The Court: I will permit it.

Mr. Bishop: On the further ground that it constitutes a reopening of this defendant's case.

Mr. Lloyd: I had rested my case, but I have a question and I ask leave to reopen.

The Court: I will permit it.

Mr. Bishop: Exception.

The Court: All right, Mr. Bishop.

Mr. Lloyd: Well, I will withdraw that question 10 and I will call Mr. Reilly as my own witness.

Direct examination.

By Mr. Lloyd:

Q. Who is Mr. John P. Diebold?

Mr. Bishop: I object.

The Court: I have ruled that he has a right to ask it. 20

Mr. Bishop: Now he is doing it another way and I want my objection of record.

The Court: All right. Exception allowed.

Q. (Repeated by the stenographer.) Who is Mr. John P. Diebold?

A. Young man employed by the Burk Motor Company. 30

Mr. Lloyd: That is all.

The Court: Mr. Reilly, did you read this statement?

The Witness: Yes, I did.

The Court: Well, why did you have this young lady sign this statement?

10 The Witness: Well, at the time, if I may explain this—at the time this accident occurred, of course the officer on the beat was one of the first there. He came in the building and of course with this young lady, and they were all scattered around a table we had in the show room with several chairs, of course, around it; and, of course, we offered every assistance possible, and we felt under the circumstances that we should have a statement to the effect that we did offer that assistance; that we tried to give this girl medical attention if she was in need of it, and it was a fact that she was not hurt. She felt that she was perfectly all right at that time.

20 The Court: Why didn't you put that in the statement?

By Mr. Baratta:

Q. Why didn't you put it in the statement?

The Court: Why didn't you put that in the statement?

30 The Witness: I haven't any particular reason for that.

The Court: What?

The Witness: I haven't any particular reason for that.

The Court: Why did you particularly say in this statement that "this is to release Mr. John R. Livezey, the owner of the car, Mr. E. P. Kohl, the driver of the car, the Burk Motor Company, and Charles E. Henkelman, respectively, of any and all blame, liability and responsibility incident to this case, inasmuch as I have suffered no personal injury thereby?"

The Witness: That was only to relieve us, if there was such a possibility. 10

The Court: You knew she was hurt; didn't you?

The Witness: I knew that she was knocked down. How badly she was hurt I didn't know.

The Court: You didn't know.

The Witness: No, I did not. 20

The Court: Yet you permitted her to sign this release in favor of your employer and these other persons?

The Witness: Yes.

The Court: And you thought that was taking care of her best interests when you were doing that? 30

The Witness: I was protecting my own employer.

The Court: And that was the only interest you had in the matter?

The Witness: Of course, I offered to take the girl

to the hospital and render any assistance of that kind.

By Mr. Lloyd:

Q. Mr. Livesey wasn't there when that was signed, was he?

A. No.

10 (Witness excused.)

EDWIN H. BURK, called as a witness on behalf of the defense, being sworn, was examined and testified as follows:

Direct examination.

20

By Mr. Bishop:

Q. Mr. Burk, you are an officer of the Burk Motor Company?

A. Yes.

Q. Mr. Livesey bought the car that was in this accident from you?

A. Yes.

Q. Or from your company. The arrangements for the sale were made with you?

30

A. Yes.

Q. Was it a condition of the sale of this automobile from you to Livesey that some one be furnished as an instructor by you to teach an employe of Livesey's how to drive it?

A. That was not my understanding of it.

Q. Beg pardon?

A. That was not my understanding of it.

Q. Had the sale been completed before anything was said about instruction?

A. I don't know what you call completion of the sale. We agreed on the price of the car. He had a peculiar kind of body he wanted and he asked us if we could get it, and we said we could; expect it for a certain time; and we agreed on the price. He agreed to take it. That was all finished and settled. And he said, "My man hasn't got a license. I would like to leave the car here until he gets his license." He said, as I recall it, the man was to go and get a permit and if he wanted to use the car I was to let a man who had a license go out with him to comply with the law. Now, I don't recall whether that —

Q. All right. Go ahead.

A. I don't recall whether that was an agreement to teach the man how to drive or not. It was not my recollection. My recollection was that he wanted a man so that his man could comply with the law when he was using his permit.

Q. Did you receive any compensation?

A. No.

Q. From the man?

A. No.

Cross-examination.

By Mr. Baratta:

Q. Isn't it customary for the seller of an automobile to teach a buyer or his nominee in the consummation of these sales or in furtherance thereof?

Mr. Bishop: I don't think we are interested in the custom.

The Court: If it is part of the trade I will permit it.

A. In our end of the automobile business, the profit is so small that you can't employ a person to do that. When such an arrangement is made, it is made between the salesman who receives a commission and the customer; and I believe in some instances the customers pay the man for doing it.

10 Q. But it is customary for the sales agency to allow men —

A. It is no part of the obligation or part of the contract on our part.

Q. Is it customary? That is all.

A. Well, if we arrange it. I don't know how we can call it customary. I am explaining how it is done.

Q. Is there anything unusual—is it anything unusual for you to undertake to teach somebody who
20 has bought an automobile?

A. Me, personally?

Q. No, your men; men in your employ?

A. The distinction I am trying to make is this: When you buy a high-priced car—for instance, I bought a car in Philadelphia—my wife did; they didn't send a salesman down with us. They sent another man with us whom they call a demonstrator, who was to show us how to take care of the car. Now, in our line of business, the margin of profit on our
30 car is so small we can't afford to do it.

Q. Well, it is not unusual?

A. I would not call it unusual for the salesman to do it, no.

Q. Salesmen, your salesmen?

A. My salesmen.

Mr. Baratta: That is all.

Cross-examination.

By Mr. Lloyd:

Q. What is your margin of profit? On a percentage basis, I suppose?

A. At the time we sold Mr. Livesey's car it was twenty per cent, and as I recall it, the f. o. b. price of that car was approximately \$500. Of course, there was freight and tax to be added. 10

Q. And there is a profit in that?

A. Yes, a profit of about \$100. No profit on the freight.

Q. Now, it is quite customary, is it not, to instruct the man who does not know how to operate a Ford, in order to bring about a sale, to agree to teach that man how to drive?

A. It is not customary for us to make an agreement, no. I explained to Mr. Baratta how the salesmen at times, sometimes make the agreement. I can't force a salesman to devote his time to that. 20

Q. Well, when Mr. Livesey bought this car, you knew it was bought for Mr. Kohl to operate?

A. Yes; I knew.

Q. And you knew Mr. Kohl didn't know how to drive a machine?

A. I didn't know that. My impression now of what happened at the time is that Mr. Kohl didn't have a license.

Q. It is a long while ago? 30

A. It is a long while ago, it is difficult to remember just what happened.

Mr. Lloyd: I think that is all.

Re-cross examination.

By Mr. Baratta:

Q. Your company undertook to teach Mr. Kohl?

A. That is the answer. That is not clear in my mind.

Q. But was Mr. Diebold in your employ?

10 A. Mr. Diebold was in my employ.

Q. Was Mr. Bannon in your employ?

A. Mr. Bannon was in my employ.

Q. And had been for some time prior thereto?

A. I would say that Mr. Bannon had been in our employ about two and a half months and Mr. Diebold about a month.

Q. How long after that did each of them stay with you?

A. I can't tell you that.

20 Q. About a month or two months?

A. Well, Diebold, I would say, stayed there about a month and a half; and Bannon I cannot recollect.

Q. Did Mr. Bannon ever teach anybody else to drive?

Mr. Bishop: I object to that as irrelevant and immaterial.

Mr. Baratta: That is all.

30 (Witness excused.)

Mr. Bishop: We rest.

DEFENDANT BURK MOTOR COMPANY
RESTS.

DEFENDANT LIVESEY'S REBUTTAL.

JOHN R. LIVESEY, recalled in rebuttal.

Direct examination in rebuttal.

By Mr. Lloyd:

10

Q. When this automobile was purchased and you negotiated for it, did you have conversation with Mr. Burk respecting the fact that Mr. Kohl would be taught to drive?

A. Somebody in that office. I fully expected that he would learn or be instructed how to operate the car; because he did not know.

Q. And was he instructed?

A. Supposed to be.

20

Mr. Lloyd: Well, you don't know that. That is all.

Cross-examination.

By Mr. Bishop:

Q. Had you bought the car before this arrangement was brought about?

A. Well, I cannot tell you whether the contract was signed or not; but I went there with the intention of buying the car from the Burk Motor Company.

30

(Witness excused.)

EDWARD P. KOHL, recalled in rebuttal.

Direct examination in rebuttal.

By Mr. Lloyd:

Q. Mr. Kohl, were you instructed how to operate this car by the Burk Motor Company or someone from the Burk Motor Company?

10 A. By Mr. Bannon and Mr. Diebold of the Burk Motor Company.

Q. Was there an arrangement at the time of the purchase of this car that they were to instruct you?

A. A verbal agreement.

Q. And you didn't take delivery of this car, as I understood you to say, until after you had received your license, about a month after?

A. After I received the driver's license.

20 Cross-examination.

By Mr. Bishop:

Q. Were you there at the time the car was bought?

A. Mr. Livesey had been in the place before I got there.

Q. He then called you?

A. Called me to meet him there.

Q. Had he agreed to buy before you arrived?

30 A. I don't know.

Mr. Bishop: That is all.

Mr. Baratta: No questions.

(Witness excused.)

DEFENDANT LIVESEY RESTS.

PLAINTIFF'S REBUTTAL.

VIRGINIA LIBERI, called as a witness in rebuttal on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

10

By Mr. Baratta:

Q. Where do you live?

A. In Philadelphia; 1417 Dixon.

Q. Do you remember an accident August 31, 1926?

A. I do.

Q. Who was in the accident?

A. Miss LaRosa.

Q. Were you with her?

A. Yes, sir.

20

Q. Now, there has been something said here about a paper that Miss LaRosa signed there. Were you present when she signed the paper?

A. I was not present. I was near the door because I felt bad.

Q. Where was Miss LaRosa after the accident?

A. They took her in the office.

Q. Were you in the office?

A. I was in the office with her.

Q. Did you read the paper to her?

30

A. No; I don't understand English.

Q. Did you see the paper?

A. I never seen it.

Q. Did they explain to you what was in the paper?

A. No; no, sir; not to me.

Q. Did you have any opportunity to tell Miss La-Rosa what to do or what not to do?

A. I was near the door and I didn't see what she done because I didn't understand English.

Q. Do you know whether or not that statement was read to her before she signed it?

A. I didn't see anything.

Mr. Baratta: That is all.

Cross-examination.

10

By Mr. Bishop:

Q. What paper have you been talking about?

A. You asked me the question about the papers which were signed by her, but I don't know anything about it because I didn't see it.

Q. You didn't see her sign it?

A. I didn't see her sign it, because I was looking outside in the street, because I felt bad.

20

Mr. Bishop: That is all.

Re-direct examination.

By Mr. Baratta:

Q. After the accident did you help Miss LaRosa home?

30

Mr. Bishop: That is not rebuttal.

Mr. Baratta: Now, wait. Now, wait. I am going to do this. I am going to show this young lady knows Miss LaRosa was in bed at the dates these people say she was working in the mill.

The Court: Ask her that, then.

Q. Do you remember how long Miss LaRosa was sick after the accident?

A. I was then in Pleasantville taking my vacation for two weeks, and then Miss LaRosa was sick, and after that I went to Philadelphia and don't know anything about it.

Q. The accident happened the 31st. Do you know what date you left for Philadelphia?

A. About the 14th or 15th of September. I don't remember. 10

Q. And from the 15th of September was Miss LaRosa in bed or out of bed when you left for Philadelphia?

A. She was in bed still.

Mr. Baratta: That is all.

Mr. Bishop: I ask that testimony be stricken because it did not say anything about the case or getting back to work until the 16th. 20

The Court: Well, it is not harmful. This witness' testimony is that the girl was in bed for two weeks.

Mr. Bishop: And you refuse to strike it?

The Court: Yes.

Mr. Bishop: Allow me an exception. 30

(Witness excused.)

FRANK LAROSA, recalled in rebuttal.

Direct examination in rebuttal.

By Mr. Baratta (through the interpreter):

Q. Mr. LaRosa, one witness testified that your daughter went to work ten days after the accident.
10 Is that true or is it not true?

Mr. Lloyd: That is objected to. There is no such testimony. September 16th is the first date.

Mr. Baratta: Ten days one other witness testified.

Mr. Lloyd: After the opening of the mill.

Q. One witness testified that on September 16th,
20 1926, your daughter was working in the mill; is that true or not true?

A. That is not the truth.

Q. When did she go to work for the first time?

A. After four or five months, as I have stated before; between the end of March and the beginning of April.

Q. Did you overhear any conversations between Mr. Starr who just testified here a moment ago and any other individuals relating to this accident or
30 period of employment?

Mr. Lloyd: I do not see the materiality of that at all.

A. Outside.

The Court: That is not material.

Mr. Baratta: I want to show this —

The Court: No, no.

Mr. Baratta: To neutralize the testimony of Mr. Starr.

The Court: Ask your question.

Q. Did Mr. Starr make any remarks about his testimony here on the stand? 10

Mr. Lloyd: That is not binding. It is immaterial.

The Court: Objection sustained.

Mr. Baratta: If I can show he made statements contrary to what he testified, can't I prove that?

The Court: You should have asked Mr. Starr that question. 20

Mr. Bishop: I think this argument of counsel is improper, and has gone to such extent that I ask for the withdrawal of a juror.

The Court: I will deny that. I won't do that.

Mr. Bishop: I ask an exception.

The Court: Allowed.

Mr. Bishop: Your Honor will consider the motion is made for direction of verdict and you allow an exception to the refusal? 30

The Court: Yes.

(Witness excused.)

(Counsel summed up to the jury for the respective parties.)

COURT'S CHARGE TO THE JURY.

CORIO, J.:

Ladies and gentlemen of the jury: The plaintiff seeks to recover a money recovery against the following defendants: John R. Livesey, Burk Motor
10 Company and Edward P. Kohl, jointly, severally and in the alternative.

In commenting on any portion of the testimony your recollection as to what that testimony is must prevail and you must not take my version of it in case I may misquote or misunderstand any portion of that testimony. That means that you are solely and purely the sole judge of the facts as testified before you by the various witnesses. So it is not what I may say. It is for you to say what the tes-
20 timony is and what evidence should control.

There is a clear indication here, ladies and gentlemen, that this little lady while walking along the street was injured by an automobile driven by one defendant Kohl who was accompanied by another defendant, Diebold, who has not been served in these proceedings, and, therefore, you cannot consider him because he was not in court, and the action so far as his case is concerned is not to be considered against that defendant.

30 The testimony further discloses that after this girl was injured she signed what is admitted in evidence as an exhibit, what purports to be on its face a release, which you have a right to read and consider. But I charge you to carefully scrutinize that paper. If it purports to be a release it is wanting for want of a consideration. There is no considera-

tion disclosed in the release in that paper. But in the final analysis it is for you to accept it for whatever value it may present in the case. I only wish to warn you to carefully consider the exhibit and take into consideration all of the extenuating circumstances in the position and the exhibit that the plaintiff was requested to sign and which is introduced now as part of the evidence.

The plaintiff must prove her case by a preponderance of the believable testimony and if you find the plaintiff has so proved her case by a preponderance of the believable testimony you will then determine as to whether or not she is entitled to damages. Of course, if you believe under the testimony that she was negligent in any way and contributed to her injuries then under the law she is entitled to no redress; but if you believe that she was not negligent and that the defendants jointly or individually were negligent and because of that negligence she was injured, she is entitled to compensation. Now, if you arrive at that point, ladies and gentlemen, that the plaintiff by a preponderance of the believable proof has satisfied you that she is entitled to damages, then she is entitled to such substantial damages as you may determine, first, for whatever medical expenses or medical bills from the time she became of the age of twenty-one until the present time; for any loss of wages or salary from the time plaintiff was twenty-one until the present time.

Now, if you reach that stage and you believe from the preponderance of the believable proof that the plaintiff is entitled to recover, then the father is entitled to recover for all moneys expended by him for doctor care, medical treatment and expenses for his daughter and for loss of services and wages from the time that she was an infant until she reached

the age of twenty-one; in other words, the father would be entitled from August 31st, 1926, to the date of this accident, until the plaintiff had arrived at the age of twenty-one, for loss of her services and earnings and compensation for whatever medical expenses, doctor bills and medicines and medical care and attendance that he has been placed to.

Now, if you have reached that stage, if from the preponderance of the believable testimony you find
10 that the plaintiff is entitled to recover, then you have a right to find a verdict in favor of the plaintiff as against John R. Livesey, Burk Motor Company and Edward P. Kohl, jointly, severally or individually. That means you can find a verdict in favor of the plaintiff as against John R. Livesey, or you can find a verdict for the plaintiff, in favor of the plaintiff, against John R. Livesey and Burk Motor Company jointly; or you can find against the whole
20 three or any two or any one, if you are convinced from the preponderance of the believable proof that the plaintiff is entitled to recover.

Of course, ladies and gentlemen, in cases of this kind the plaintiff must be free of any contributory negligence. The plaintiff must satisfy you by a preponderance of the believable proof that defendants, any one of them or all of them, or either one of them, was negligent; that the operation of this car was of such a negligent manner that because of it she received her injuries, and if you are satisfied
30 as to that then, of course, you have a right to find a money verdict in favor of the plaintiff and a money verdict as I have designated it in favor of the father.

Now, if you find that the defendants, any one of them or all of them, were not negligent and that it was not their negligence that caused the injuries

sustained by the plaintiff, then, of course, it is your clear duty to bring in a verdict of no cause of action.

Now, counsel for defendant Burk Motor Company has requested several charges, part of which I will read and some I will refuse.

Now, I charge you as follows:

There can be no joint verdict (against any of these defendants) unless it is proved that the defendants were acting in concert. That is, there can not be a verdict jointly against the Burk Motor Company and John R. Livesey or his agent, Mr. Kohl, unless Burk Motor Company was acting in concert with Livesey or Kohl and their joint negligence caused the accident. 10

I so charge you.

There can be no judgment against the Burk Motor Company unless Burk Motor Company was negligent and their negligence was an obtaining cause of the accident.

I so charge you. 20

And I add thereto that that negligence may be inferred by you, ladies and gentlemen, from the preponderance of the believable proof, if it occurred through any agent or servant of the Burk Motor Company; and I charge you as a matter of law a master is liable for the tortuous acts of his servants in the course of his employment.

I charge as requested, even if you believe that the Burk Motor Company's negligence caused the accident, there can be no judgment in favor of the plaintiff, if you believe her to be guilty of contributory negligence. 30

I so charge you, because if you believe that the plaintiff herself was guilty of contributory negligence she is entitled to no recovery and you cannot base any kind of a money verdict in her favor

if you believe she was guilty of contributory negligence.

I charge as requested, the plaintiff was bound at the time of the accident to exercise ordinary care, not only to avoid dangerous places known to her, but also those of which she was ignorant.

I so charge you.

The rest of the charges as contained in this paper I refuse.

- 10 Now, counsel for the plaintiff among numerous other requests has requested the Court to charge as follows, and I will charge only number 11, which is as follows:

“By our law (that is, by the New Jersey law) one who entrusts a dangerous instrumentality in the hands of a novice and by reason of his inexperience and skill in its operation injures another, is liable for the damages resulting therefrom.

- 20 It is true that automobiles are not generally held to be dangerous instrumentalities *per se*; that is, the thing itself is not dangerous when carefully and intelligently handled. They are not usually dangerous to other persons using the public highways with due care; but their great power, weight and speed endow them with dangerous potentialities, and when not handled carefully by competent persons they become, under certain conditions (and those certain conditions, ladies and gentlemen, are to be determined by you from the facts and the testimony
- 30 that you have heard in this case—whether or not the instrumentality, the automobile, as operated by one of these defendants, Kohl, was) a highly dangerous instrumentality and a public menace.”

And I strike out the last sentence and refuse to charge that part of it.

So then, ladies and gentlemen, not to further con-

fuse you, it is for you now—the case is yours—it is for you now to analyze the testimony and to return your verdict in the manner that I have suggested to you. You will take with you the complaint, the two answers and these exhibits so that you may be guided in your deliberations.

Mr. Baratta: Your Honor, up to this point, has said nothing about compensation for the plaintiff for her own pain and suffering by reason of the 10 accident.

The Court: I am very glad you called that to my attention.

The plaintiff is also entitled, if you find she is entitled to a verdict, to such loss of earnings as she has suffered from the age of twenty-one to date, and such loss of earnings she may probably lose in the future by reason of her injuries; and I am very glad you called my attention to that because there 20 is a question here as to that which I had overlooked by one of the other defendants, which I desire to charge you; there being so many and I had such a short space of time to look them over.

With relation to future pain, suffering and injuries, your verdict, if you determine that the plaintiff is entitled to recover, must be limited to the present value of the future loss; and I so charge you.

Now, I believe we are straightened out all right, 30 and you may retire with the two answers and the complaint.

Mr. Bishop: I ask an exception to the Court's refusal to charge my requests that were not charged.

DEFENDANT BURK MOTOR COMPANY'S
REQUESTS TO CHARGE.

There can be no joint verdict unless it is proved that the defendants were acting in concert. That is, there can not be a verdict jointly against the
10 Burk Motor Company and John R. Livesey or his agent, Mr. Kohl, unless Burk Motor Company was acting in concert with Livesey or Kohl and their joint negligence caused the accident.

There can be no judgment against the Burk Motor Company unless Burk Motor Company was negligent and their negligence was an obtaining cause of the accident.

Even if you believe that the Burk Motor Company's negligence caused the accident, there can be
20 no judgment in favor of the plaintiff, if you believe her to be guilty of contributory negligence.

With relation to future pain, suffering and injuries, your verdict, if you determine that the plaintiff is entitled to receive any, must be limited to the present value of the future loss.

If Mr. Diebold, generally an employe of the Burk Motor Company, was at the time of the accident an agent for Livesey in aiding Kohl to drive or operate the automobile, then the Burk Motor Company is
30 relieved of responsibility, and there can be no judgment against them.

The plaintiff was bound at the time of the accident to exercise ordinary care, not only to avoid dangerous places known to her, but also those of which she was ignorant.

If you find that Diebold was in such proximity to

*Defendant Burk Motor Company's Requests 165
to Charge*

Kohl as to be able to furnish with reasonable promptness such advice and assistance as may be necessary for the safe operation of the automobile, as was reasonable considering the character of the automobile which was being operated, then there can be no finding of negligence on the part of the Burk Motor Company, nor can any judgment be entered 10
against them.

If you find that the mechanism and appliances of the automobile involved in this accident was such that all that Diebold could reasonably do to assist Kohl in the operation thereof was to advise him what to do, and if you find that he gave him that advice, there can be no negligence on the part of the Burk Motor Company and no judgment against them.

If the automobile was, at the time of the acci- 20
dent, under the direction and charge of Livesey, and/or his agent, Kohl, then the Burk Motor Company is relieved of liability, and there can be no judgment against them.

If you find that the Burk Motor Company, after selling the car to Livezey, delegated Diebold at Livesey's request to assist Kohl in driving the car in company with Kohl, then the Burk Motor Company is not responsible for the injury resulting to the plaintiff in this case. 30

NOTICE OF APPEAL.

(Filed June 25th, 1931.)

NEW JERSEY SUPREME COURT.

10

FRANCES LAROSA, by her
next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,
Plaintiffs-Respondents,

v.

20 JOHN R. LIVEZEY, BURK
MOTOR COMPANY, a
corporation; JOHN P.
DIEBOLD and EDWARD
P. KOHL, jointly, sev-
erally and in the alter-
native,

Defendants,

BURK MOTOR COMPANY,
a corporation,

30 *Defendant-Appellant.*

On Appeal.
Notice of Appeal.

To Anthony J. Siracusa, Esquire, Attorney for
Plaintiffs-Respondents:

Dear Sir:

Take notice that the defendant-appellant, Burk Motor Company, a corporation of the State of New Jersey, hereby appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

THOMPSON & HANSTEIN, 10
Attorneys for and of Counsel
with Defendant-Appellant.

20

30

REASONS FOR REVERSAL.

(Filed July 25th, 1931.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

FRANCES LAROSA, by her
next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,
Plaintiffs-Respondents,

20

v.

JOHN R. LIVEZEY, BURK
MOTOR COMPANY, a
corporation; JOHN P.
DIEBOLD and EDWARD
P. KOHL, jointly, sev-
erally and in the alter-
native,

Defendants,

30

BURK MOTOR COMPANY,
a corporation,
Defendant-Appellant.

On Appeal from the
Supreme Court.
Reasons for
Reversal.

The Burk Motor Company, the defendant-appel-
lant by Thompson & Hanstein, its attorneys, hereby

presents the following reasons for the reversal of the judgment of the New Jersey Supreme Court appealed from herein:

1. The said New Jersey Supreme Court erred in affirming the judgment of the Court of Common Pleas of the County of Atlantic for the reason that said New Jersey Supreme Court upon the record 10 of the said Court of Common Pleas of the County of Atlantic, should have reversed said judgment of the Court of Common Pleas of the County of Atlantic.

2. Because of the reasons assigned in the New Jersey Supreme Court by this appellant for the reversal of the judgment of the Court of Common Pleas of the County of Atlantic appealed from, the said New Jersey Supreme Court should have re- 20 versed said judgment and not affirmed the same.

THOMPSON & HANSTEIN,
*Attorneys of Burk Motor Com-
pany, Defendant-Appellant.*

OPINION.

(Filed May 15, 1931.)

NEW JERSEY SUPREME COURT.

10

No. 18.

October Term, 1930.

20

FRANCES LAROSA, by her
next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,

Respondents,

v.

JOHN R. LIVEZEY, BURK
MOTOR COMPANY, JOHN
P. DIEBOLD and ED-
WARD P. KOHL,

Defendants;

BURK MOTOR COMPANY,

Appellant.

30

Argued October Term, 1930. Decided May, 1931.

ON APPEAL FROM ATLANTIC COUNTY COMMON PLEAS
COURT.

For appellant: THOMPSON & HANSTEIN.

For respondents: ANTHONY J. SIRACUSA.

Before GUMMERE, Chief Justice, and JUSTICES TRENCARD and LLOYD.

10

Per Curiam:

This action is to recover damages for injuries claimed to be due to negligence in the operation of an automobile. It was against several defendants, including the Burk Motor Company alone, and that company appeals.

The liability of the Burk Motor Company could only arise through the negligence of one John P. Diebold, who, it was claimed, was its agent at the time of the accident, supervising the handling of the car. While Diebold was originally made a party, he was never served with summons and complaint, and his name was dropped out at the time of the trial. 20

The story of the case was that the defendant, Livezey, had purchased an automobile from the Burk Motor Company and at the time of the accident it was being driven by Livezey's employee, Kohl. Seated beside Kohl was Diebold, an employee of the Burk Motor Company, and two questions are presented on the appeal: (1) Whether Diebold was sent by the Burk Company as an instructor to Kohl, and (2) Assuming that he was, 30

whether the accident was due to the negligence of Kohl or of Diebold or of both.

The facts which the jury might find were that Kohl was a learner without license to drive and unfamiliar with the operation of a car; that Livezey in buying the car sought an instructor (as seems to be usual), from the automobile company to accompany the driver so that the latter could learn to operate the car; that there was an arrangement made that Bannon, also an employee of the Burk Company, should go out with Kohl and instruct him; that Bannon, who had on two previous occasions accompanied Kohl, was not available when the car was taken out on the day of the accident and Diebold was substituted for the purpose. There was sufficient evidence to indicate that Diebold was sent by the Burk Company as an instructor to Kohl, and if there was negligence on his part causing the plaintiff's injuries, obviously the negligence would be chargeable to the Burk Company.

As to the negligence itself, the plaintiff was walking along Atlantic Avenue in Atlantic City. While so walking the automobile ran up on the sidewalk pinning her against the wall, backed away and then struck her again. At the time Kohl was at the steering wheel and Diebold was sitting beside him. From this negligent operation could certainly be inferred, and under the circumstances that such negligence was that of Diebold. It must be that one situated in the position of Diebold is available to avoid just such an accident as here occurred. Otherwise his presence in the car would be of little value. He was there to act in an emergency; to guide the car or to stop it. The car was a left-hand drive and the

manipulation of the gears was to the driver's right between Diebold and Kohl. It seems to us, or at least the jury might find, that under such circumstances when the car started to leave the street and go up on the sidewalk it was incumbent on the instructor to take precautions, and failing to do this, if an accident resulted he and his employer would be responsible.

The motion for non-suit was properly denied and the judgment is affirmed.

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ORDER ON AFFIRMANCE OF JUDGMENT.

(Filed May 22, 1931.)

NEW JERSEY SUPREME COURT.

10

No. 18.

October Term, 1930.

20

FRANCES LAROSA, by her
next friend, FRANK
LAROSA, and FRANK
LAROSA, her father, in
his own right,
Plaintiffs-Respondents,

v.

JOHN R. LIVEZEY, BURK
MOTOR COMPANY, JOHN
P. DIEBOLD and ED-
WARD P. KOHL,
Defendants-Appellants.

On Appeal from
Atlantic County
Common Pleas
Court.

Order on Affirmance of
Judgment.

30

This cause having been duly argued at the October Term, 1930, of this Court, by Anthony J. Siracusa, Esq., of counsel with the plaintiffs-respondents, and Wilbur Bishop, Esq., associated with the firm of Thompson & Hanstein, of counsel with the defen-

dants-appellants, and the Court having considered the same, and finding no error in the record of proceedings in the Atlantic County Common Pleas Court,

It is, thereupon, on this 22 day of May, 1931, ordered and adjudged that the judgment of the Atlantic County Common Pleas Court, removed by the appeal in this cause, be affirmed with costs to be taxed; and that the record be remitted to the Atlantic County Common Pleas Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered May 22, 1931.

On motion of

ANTHONY J. SIRACUSA,
Attorney for Respondents.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

FRANCES LAROSA, by her next friend, FRANK
LAROSA, and FRANK LAROSA, her father, in
his own right,
Plaintiffs-Respondents,

v.

JOHN R. LIVEZEY, BURK MOTOR COMPANY, a corpora-
tion; JOHN P. DIEBOLD and EDWARD P. KOHL,
jointly, severally and in the alternative,
Defendants,
BURK MOTOR COMPANY, a corporation,
Defendant-Appellant.

ON APPEAL.

BRIEF OF BURK MOTOR COMPANY, A COR-
PORATION, DEFENDANT-APPELLANT.

STATEMENT OF CASE.

In this case, the plaintiffs brought suit against
various defendants in the Atlantic County Common

Pleas Court which resulted in a judgment of no cause for action as against all but the defendant Burk Motor Company, this appellant, and as against the Burk Motor Company, the plaintiffs recovered a judgment. An appeal was taken from that judgment to the New Jersey Supreme Court where it was sustained. This appeal brings up the judgment of affirmance in the Supreme Court.

The basis of the infant plaintiff's suit was that while she was walking along the sidewalk in Atlantic City, she was struck by an automobile owned by the defendant Livezey at a time when the operator of the automobile was undertaking to drive it across the sidewalk and into a garage. The car was at the time operated by defendant Edward P. Kohl, an employee of Livezey. At that time Diebold was sitting beside the said Kohl. Diebold was an employee of this appellant, Burk Motor Company. Diebold was named as a defendant but service was not obtained upon him and the case was, therefore, not tried as against him.

The allegations of the complaint against the Burk Motor Company are set out in the fifth, sixth, seventh and eighth counts.

The fifth count alleges that the Burk Motor Company, through its agent, Diebold, was engaged in the business of teaching Kohl to drive a car and was negligent in entrusting the management of the automobile to the said Kohl.

The sixth count charges that the Burk Motor Company and Diebold were engaged in the business of teaching Kohl to drive and both were negligent in entrusting the management of the automobile to Kohl.

The seventh count alleges that the Burk Motor Company, through its agent, Kohl, was negligent in that Kohl improperly operated the automobile.

The eighth count charges the joint negligence of Burk Motor Company through its agent Kohl, and Kohl in the operation of the automobile.

There was no question in the case but that the automobile was a model "T" Ford truck that was owned by defendant Livezey, he having purchased the same from defendant Burk Motor Company sometime before and continued to store said car in the Burk Motor Company garage. There was no dispute but that the car was being operated by Kohl and that Kohl was Livezey's agent. It is not denied that Diebold, who accompanied Kohl on the day in question, was employed as a salesman by the Burk Motor Company.

Defendant, Burk Motor Company, contends that at the time of the trial there was no proof to show that Diebold was the agent of Burk Motor Company for the purpose of instructing Kohl and that assuming that there was proof of such agency, there was no proof of negligence on the part of Diebold.

The Burk Motor Company accordingly moved for a non-suit and a directed verdict, both of which were refused. That refusal was made the basis of the appeal to the Supreme Court. The Supreme Court sustained the verdict, we contend, erroneously.

ARGUMENT.

It was argued in the Supreme Court that there was no evidence that Diebold was the agent of the Burk Motor Company for the purpose of instructing Kohl. However, there was possibly some evidence of agency and the Supreme Court having so found, that point is abandoned.

The other point upon which the appellant relied in the Supreme Court was that there was no proof of negligence on the part of Diebold. That point is urged here as the sole ground for reversal.

Livezey's employee, Kohl, had been taking lessons in the operation of the automobile in question from one Bannon, an employee of the defendant Burk Motor Company, and had on several occasions operated the car in company with Bannon. On the day in question, Bannon was unable to accompany Kohl and requested Diebold to do so. Diebold drove the car away from the garage down to a little travelled section and turned the car over to Kohl who practiced driving. Kohl drove the car back to the garage. With respect to the manner of the happening of the accident, he testified as follows: (p. 96.)

“Q. And why didn't you stop instead of going up there and give the car over to the instructor?

A. Because I thought I was competent to make the turn.

Q. Do you know whether or not Mr. Diebold was employed there at the Burk Motor Company before the day that you took the car?

A. I do not.”

The car was a left-hand drive and its operation was controlled by three pedals and an emergency brake which was to the driver's left. See testimony pages 102 and 103. The Supreme Court in its opinion says: "The car was a left-hand drive and the manipulation of the gears was to the driver's right between Diebold and Kohl." That was clearly not warranted by the testimony. That misapprehension by the Court of the testimony permitted the Court to reach the conclusion that it was possible for Diebold to do something in the emergency that would have prevented the accident. Had the facts been as set out in the opinion of the Supreme Court, that would have been an entirely reasonable conclusion. If Diebold could have pulled on the emergency brake, he could very likely have prevented the accident. The testimony shows that the emergency brake was over to the opposite side of the driver and the only way in which Diebold could have manipulated the pedals, would have been if he could have gotten his feet upon them. That was obviously impossible.

Neither the testimony nor any reasonable inference that could be drawn from the testimony shows that Diebold could have done anything.

The Supreme Court seemed to take the view that if Diebold was not in a position to avoid such an accident, then his presence in the car would be of little value. The presence of a licensed operator in an automobile driven by a learner is required by the statutes. To adopt the view that a licensed operator in an automobile driven by a learner is responsible for the occurrence of an accident merely because the legislature has declared that he must

be there, would certainly be most unreasonable. And yet that is the logical result of the conclusions of the Supreme Court. In a car in which the driver sits to the left with the emergency brake in the centre, it is entirely reasonable to say that the licensed driver sitting beside the emergency brake is in a position to pull on the brake and thus take steps to avoid the happening of an accident, but where he is not able to reach the brake, he is not able to take steps to avoid the accident and the mere fact that he is sitting on the front seat because the legislature required him or someone else to be there, should not impose liability upon him.

In this case Kohl thought that he was competent to drive into the garage. If he thought so, he should be considered the judge of that fact and not Diebold, and it was, therefore, not negligent for Diebold to permit him to do so.

The allegations of negligence as against the Burk Motor Company are, generally speaking, that it was negligence to entrust the management of the automobile to Kohl and that the defendant failed to exercise proper control over the operation and management.

We submit that there is no proof whatever that there was any negligence in the supervision of Kohl's operation. There was no proof that Diebold could have done anything that would have averted the accident.

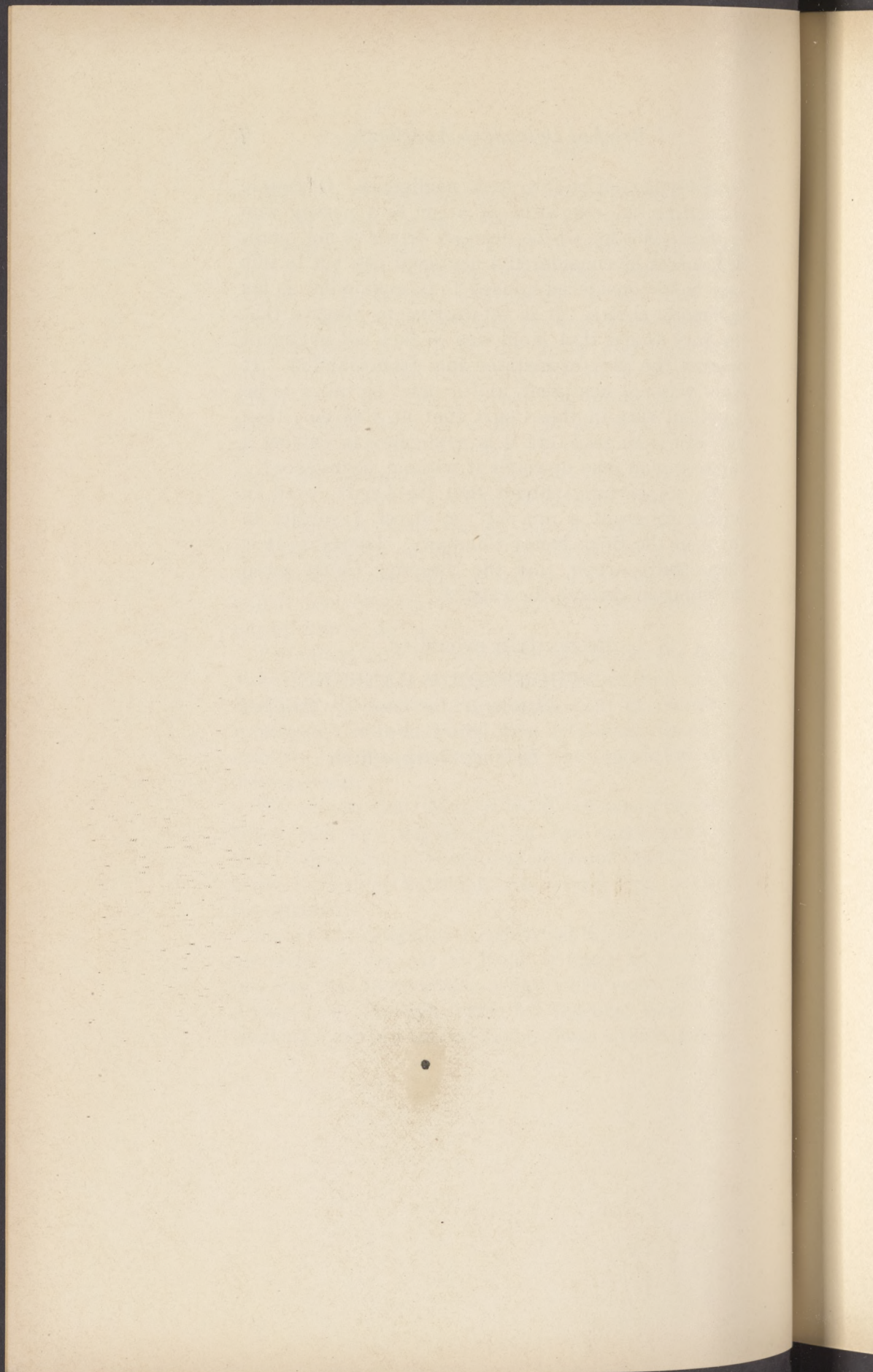
So far as negligence is concerned in entrusting the operation of the car to Kohl, it must be perfectly obvious that there comes a day when every learner drives a car through traffic for the first time. Entrusting a car to a learner under those circumstances,

certainly cannot be *ipso facto* negligence. Of course entrusting the operation of a car to a person who to the knowledge of the licensed driver is not qualified, might be considered a negligent act, but in this case Kohl considered himself to be competent as his testimony shows. It is interesting to observe that the jury found that Kohl was in fact not negligent because the jury exonerated him from liability. If Kohl was not negligent, and it must be taken to be a settled fact in this Court that he was not, then how can it be said that it is negligence to entrust a car to a man who operates it without negligence?

We respectfully submit that the Court erred in failing to grant a non-suit or direct a verdict in favor of the Burk Motor Company. Therefore it is respectfully urged, that the Supreme Court erred in failing to reverse the verdict.

Respectfully submitted,

THOMPSON & HANSTEIN,
*Attorneys for and of Counsel
with Burk Motor Company,
Defendant-Appellant.*



NEW JERSEY COURT OF ERRORS AND
APPEALS.

FRANCES LAROSA, by her next friend, FRANK LAROSA,
and FRANK LAROSA, her father, in his own right,
Plaintiffs-Respondents,

v.

JOHN R. LIVEZEY, BURK MOTOR COMPANY, a cor-
poration; JOHN P. DIEBOLD and EDWARD P.
KOHL, jointly, severally and in the
alternative,
Defendants,
BURK MOTOR COMPANY, a corporation,
Defendant-Appellant.

ON APPEAL.

BRIEF OF PLAINTIFFS-RESPONDENTS.

STATEMENT OF CASE.

To clarify the statement of the case rather dis-
jointedly set forth in appellant's brief, and to avoid
any misapprehension as to it, we repeat. On Au-

gust 31, 1926, Frances LaRosa, at or about midday was walking along the sidewalk across the street from the Reading Station and between the avenues of Arkansas and Missouri, in Atlantic City, New Jersey. While so walking, an automobile driven by Edward P. Kohl came upon the sidewalk, struck her once, pinned her against the wall of the abutting premises, backed away and then struck her again.

At the time, Kohl was being taught to drive by John P. Diebold, an employee of the Burk Motor Company, and as we contend pursuant to an agreement or undertaking on the part of the Burk Motor Company so to do. The Burk Motor Company was situated in the Henkelman Building. At one corner of the building and running along to the rear thereof, there was a box-like aperture seven feet wide and the first story in height. It was on the return from one of Kohl's trips of instruction, and while Kohl was attempting to drive the car through this aperture, that the accident occurred.

Suit was brought against John R. Livezey, the purchaser of the car; Edward P. Kohl, one of his employees; John P. Diebold, who was teaching Edward P. Kohl and who was an employee of the Burk Motor Company; and the Burk Motor Company. John P. Diebold was never served with summons and complaint so that suit could not proceed as against him. The case continued against the answering defendants, John R. Livezey, Edward P. Kohl and Burk Motor Company. The Burk Motor Company was the Ford agent from which company John R. Livezey was purchasing the car that figured in the accident. Motions for a non-suit and a direction were made by the appellant and refused by the

trial Court. The case having been submitted to the jury, a verdict was returned against the defendant, Burk Motor Company, alone. An appeal was taken to the Supreme Court and the judgment of the Court below was affirmed. Appellant now appeals from the judgment of the Supreme Court.

ARGUMENT.

Appellant argued in the Supreme Court that the Court below erred in permitting the case as against the Burk Motor Company to go to the jury for the reasons that;

A. John P. Diebold was not negligent, and

B. Even if John P. Diebold were negligent, still he was not the servant or agent of the Burk Motor Company in the course of its business.

The Supreme Court found no error in the proceedings in the court below, and affirmed the judgment of the Atlantic County Common Pleas.

Appellant now admits that John P. Diebold was the servant or agent of the Burk Motor Company in the course of its business at the time of the accident so that we are here agreed that Burk Motor Company, at the times here in question, was acting through its agent or servant, John P. Diebold.

Appellant has abandoned the agency feature raised in its appeal in the Supreme Court, and in

this court, urges as the sole ground for reversal "that there was no proof of negligence on the part of Diebold" and consequently, no negligence on the part of his master or principal, the defendant, Burk Motor Company.

With reference to the negligence of Burk Motor Company, respondent's case rests on two theories:

1. Burk Motor Company entrusted the management and operation of a dangerous instrumentality in the hands of a novice.

2. Burk Motor Company failed to exercise proper care, vigilance and control over the operation and management of the automobile.

These theories are set forth in the fifth and sixth counts of the complaint.

John P. Diebold knew Edward P. Kohl to be a novice and without skill.

Edward P. Kohl, page 87, line 8:

"Q. Who was in that accident?

A. Why, I was driving the car. John P. Diebold was sitting alongside of me, the instructor."

Edward P. Kohl, page 89, line 20:

"Q. At the time of the accident were you or were you not being taught or learning how to drive?

A. I was under instruction.

Q. From whom?

A. John P. Diebold."

Edward P. Kohl, page 100, line 2:

“Q. Then you took it over?

A. I took it.

Q. Did you practice turns and backing and going forward, etc.

A. On Winchester Avenue and Ventnor where he informed me they gave the test for drivers' licenses.”

Edward P. Kohl, cross, p. 98, line 13:

“Q. You were driving then on a learner's permit?

A. Yes, sir.”

Yet, knowing Kohl to be a novice, Diebold permitted Kohl the management and operation of the automobile along a busy thoroughfare, Atlantic Avenue, between Arkansas and Missouri Avenues, and opposite the Reading Station, and more particularly, with several people coming along the sidewalk (see *Edward P. Kohl*, page 96, line 12), permitted Kohl to turn across the sidewalk so that Kohl might negotiate this box-like opening, seven feet wide and one story high, into the Henkelman Building (see *Edward P. Kohl*, page 94, line 30 to page 95, line 7), in the course of which Kohl lost control of the automobile and struck the plaintiff twice (see *Edward Kohl*, page 95, line 12), and pinned her to the wall (see *Frances LaRosa*, page 36, line 4).

Nowhere is it testified to that Kohl or Diebold gave any warning or signal of their approach. On the other hand, there is every indication to the contrary.

Frances LaRosa, page 36, line 2:

“* * * I was walking in front of Burk's Motor Company when all of a sudden a machine came up, it struck me. It pinned me to the wall; backed up and hit me again the second time.”

It is testified to that in the automobile which figured in the accident, the emergency brake is to the driver's left hand and that anybody that sits on the front seat beside the driver must sit to the right of the driver, and that in order for someone else sitting on the front seat to get at the emergency brake, he would have to reach across the driver to the extreme left-hand side of the car.

Edward P. Kohl, page 102, line 25:

“Q. The emergency brake is to the driver's left?

A. The driver's left hand.

Q. Anybody that sits on the front seat beside you is to your right?

A. Yes.

Q. To the right of the driver?

A. Yes.

Q. So that in order for someone else sitting on the front seat to reach the emergency brake, they would have to reach across the driver to the extreme left-hand side of the car to reach it; is that right?”

And appellant lays great stress upon the position of the brake, on page 5 of its brief, and notwithstanding that the machine was a model T Ford truck, operated with three pedals, one of which pedals to the driver's right, and between the driver

and instructor was the brake (see *Edward P. Kohl, cross, page 100, line 25, to page 101, line 13*).

Appellant then concludes "Neither the testimony nor any reasonable inference that could be drawn from the testimony shows that Diebold could have done anything."

And in the foregoing quotation is contained the essence of appellant's aggrievement. It reasons throughout its brief, that Diebold could have done nothing, and, therefore, did nothing to avoid or avert the accident, and that the Supreme Court was under a misapprehension in assuming that he could have done something, and that consequently the Supreme Court erred in its decision.

Assuming, but not conceding the facts to be as appellant would have them, rather than as appellant says the Supreme Court conceived them to be, then how much more strongly must the facts militate against appellant's position, to entrust the machine to his pupil under the circumstances, when he, the instructor, was unable to do anything in an emergency? But was Diebold in a position to do nothing? Could he not have diverted the course of the automobile? Could he not have jammed his foot on the brake pedal between the pupil and himself? Could he not have reached down and turned off the ignition? Could he not have sounded the horn or klaxon? All of which things Diebold certainly did not do, as has, hereinbefore, been shown; for it will be remembered, the automobile struck Frances La-Rosa, pinned her to the wall, bounded back and struck her again.

Touching what appellant may have to say concerning the required presence of a licensed operator

in an automobile driven by a learner, it strikes us that as between pupil and instructor, there are duties which are mutually reciprocal, the pupil on the one hand must submerge his personality and judgment in those of the instructor, and the instructor, on the other hand, must determine where, when and under what circumstances he shall entrust the automobile to the pupil—that is, must determine the pupil's competency; and having so entrusted the car, must exercise proper care, vigilance and control over its operation during such entrustment. Else why require the presence of a licensed operator at all?

In the instant case, by virtue of the entrustment, and in keeping with what we have just said, the pupil might well have thought himself competent, as appellant points out. And he relied on the judgment of Diebold, the instructor. (*Edward P. Kohl, direct, page 94, line 18*):

“A. I relied on his judgment, not on mine.”

Might it not then be that an ordinary reasonable man, under the circumstances, relying on his instructor's judgment, should think himself competent, his instructor permitting him to operate the car under the given conditions and yet, from his ignorance, inexperience and lack of skill, with knowledge of all of which the instructor is charged, the accident have resulted? And might it not be that the driver, as an ordinary reasonable man, relied on the instructor to avoid or avert such an accident as this, by skilful, timely intervention, in just such an emergency—“to guide the car or stop it”—as the Supreme Court happily puts it?

And could not the jury so find?

Appellant points out that it is interesting to observe that the jury found that Kohl, in fact, was not negligent because the jury exonerated him from liability, and that it must be taken to be a settled fact in this court, that he was not. As interesting as this speculation might be, it is not a proper subject of inquiry here.

Throughout this brief, we have touched upon the conduct of Kohl, the learner, and the jury's probable reaction to such conduct, purely because appellant insists upon injecting it into this controversy, albeit, as an interesting observation.

We repeat, Kohl's conduct, and the jury's reaction thereto, is not a proper subject of inquiry now. Firstly, because Burk Motor Company can't be heard to say that it should be exculpated when, under the facts, the jury could not only have found it culpable but, as well another, acting or failing to act in concert with it. The only ones injured by a finding against appellant, alone, are the respondents. Secondly, such alleged aggrievement at the jury's finding must be raised on a rule to show cause and not on appeal.

That verdict against one defendant is inconsistent with verdict and judgment against co-defendant is not ground for appeal but ground for setting aside verdict.

Monmouth Plumbing & Supply Co. v. Herbert, 8 N. J. Mis. R. 336; affirmed 9 N. J. Mis. R. 250.

And lastly, and above all, the inquiry is beside the issue. It will be remembered, this appeal is prosecuted to test the propriety of the lower Court's

action in refusing to grant a non-suit and/or a direction. And the propriety of the trial Court's action turns upon the sole point urged on this appeal—whether or not there was sufficient testimony as to the negligence of Diebold, and, consequently, the Burk Motor Company, to warrant a jury in finding against the appellant.

We respectfully submit that on both the theories, upon which respondents' case rests, there was sufficient testimony on the question of negligence to warrant the submission of the cause against Burk Motor Company to the jury.

A motion for a non-suit or to direct a verdict for the defendant based upon the insufficiency of the evidence to establish a cause of action, admits the truth of the plaintiff's evidence and every inference which can be legitimately drawn therefrom, but denies its sufficiency in law.

Jones v. Public Service, 86 L. 646 (92 Atl. 397).

Our Courts have held in *Wilson v. Bauer*, ⁹⁷ 87 L. 482-484, and the lower Court properly so charged (see Court charge, page 162, line 20, etc.):

"It is true that automobiles are not generally held to be dangerous instrumentalities *per se*; that is, the thing itself is not dangerous when carefully and intelligently handled. They are not usually dangerous to other persons using the public highways with due care, but their great power, weight and speed endow them with dangerous potentialities, and when not handled carefully by competent persons they become,

under certain conditions (and those certain conditions, ladies and gentlemen, are to be determined by you from the facts and the testimony that you have heard in this case—whether or not the instrumentality, automobile, as operated by one of these defendants, Kohl, was), a highly dangerous instrumentality and a public menace.”

In *Wilson v. Bauer*, *supra*, our Supreme Court, reiterating the doctrine laid down in *Van Winkle v. American Steam Boiler Company*, 52 L. 240, further stated:

“The underlying principle of the rule is stated in *Van Winkle v. American Steam Boiler Co.*, 52 N. J. L. 247, thus: ‘In all cases in which any person undertakes (or authorizes) the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, *ipso facto*, imposes as a public duty, the obligation to exercise such care and skill.’ ”

How, then, can it be successfully pretended that the jury could not find that Diebold failed to exercise proper care, vigilance and control over the operation and management of the automobile or that Diebold did not entrust the management and control over a dangerous instrumentality to a novice without skill, and that as a result of which entrustment and because of such lack of skill, the accident occurred? And how is the case at bar to be distinguished from the case of *Wilson v. Bauer*, *supra*?

In *Wilson v. Bauer*, in order that a chauffeur might teach a novice to drive, an employer, through his servant, the chauffeur, entrusted the management and operation of an automobile (a dangerous instrumentality) in the hands of the novice. The novice subsequently lost control of the car and struck an innocent passer-by on the sidewalk. In the instant case, Burk Motor Company, through its servant, John Diebold, entrusted the operation and control of an automobile (a dangerous instrumentality) in the hands of Edward Kohl, a novice. And, as in *Wilson v. Bauer*, the novice subsequently lost control of the automobile and struck an innocent passer-by on the sidewalk.

Appellant seems to find great fault with the Supreme Court's opinion. The crux of the Supreme Court's opinion can be stated in this portion:

"It must be that one situated in the position of Diebold (instructor) is available to avoid just such an accident as here occurred. Otherwise his presence in the car would be of little value. He was there to act in an emergency, to guide the car or to stop it."

Anything else the Supreme Court might have said was purely by way of illustration of what Diebold, the instructor, might have done in the given emergency. Appellant, seizing upon these illustrations, through the use of ingenious sophistry, would make great capital of the dictum of that Court, which Court as well as not, could have pointed out several precautions that Diebold, the instructor, could have taken, such as, we reiterate, sounding the horn or klaxon, turning off the ignition switch, applying

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In *Wilson v. Bower*, in order that a chauffeur might teach a novice to drive an automobile, through his servant, the chauffeur, entrusted the automobile (a dangerous instrumentality) to the hands of the novice. The novice subsequently lost control of the car and struck an innocent passerby on the sidewalk. In the instant case, Burk Motor Company, through its servant, John Diebold, entrusted the operation and control of an automobile (a dangerous instrumentality) to the hands of Edward Kell, a novice. And, as in *Wilson v. Bower*, the novice subsequently lost control of the automobile and struck an innocent passerby on the sidewalk.

Appellant seems to find great fault with the Supreme Court's opinion. The crux of the Supreme Court's opinion can be stated in this portion:

"It may be that one situated in the position of Diebold (instructor) is available in some particular case as a teacher or as a helper in such an accident as here occurred. That is not the question in this case. He was there to act in an emergency, to guide the car or to stop it."

Anything else the Supreme Court might have said was purely by way of illustration of what Diebold, the instructor, might have done in the given emergency. Appellant, seizing upon these illustrations through the use of insidious sophistry, would make great capital of the dictum of that Court, which Court as well as laws, could have pointed out several precautions that Diebold, the instructor, could have taken, such as, no reference regarding the foot or hand, turning off the ignition switch, applying